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I. FUNDAMENTAL RIGHTS: PRINCIPLE NE BIS IN IDEM

Judgment of the Court of Justice (First Chamber), 25 January 2024, Parchetul de pe lângă Curtea de Apel Craiova and Others, C-58/22

Link to the full text of the judgment

Reference for a preliminary ruling – Charter of Fundamental Rights of the European Union – Article 50 – Principle ne bis in idem – Criminal proceedings brought in rem – Order that no further action be taken adopted by a public prosecutor – Admissibility of subsequent criminal proceedings brought in personam for the same facts – Conditions that must be satisfied in order for a person to be regarded as having been finally acquitted or convicted – Requirement for a detailed investigation – No interview of a possible witness – No interview of the person concerned in the capacity of 'suspect'

Seised of a request for a preliminary ruling from the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania), the Court of Justice provides clarifications as to the two components, 'bis' and 'idem', of the principle ne bis in idem, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), [1] in the context of a case in which criminal proceedings commenced against a person in the context of a second set of proceedings were closed owing to an order that no further action be taken adopted by a public prosecutor's office, in the first proceedings, from which it is not apparent, on the basis of evidence, that the legal situation of that person as liable, criminally, for the facts constituting the offence prosecuted was examined.

On 30 April 2015, at a meeting of the cooperative company BX, the president of that company, NR, demanded that some of its employees pay a sum of money which she was required to pay, on pain of their contracts of employment being terminated. Her demand not having been satisfied, she issued and signed decisions terminating those contracts.

The employees concerned then brought two criminal complaints against NR, which were registered, respectively, with the Parchet de pe lângă Judecătoria Slatina (Public Prosecutor's Office at the Court of First Instance, Slatina, Romania) under the reference 673/P/2016, and the Parchet de pe lângă Tribunalul Olt (Public Prosecutor's Office at the Regional Court of Olt, Romania) under the reference 47/P/2016.

In case 673/P/2016, after having brought criminal proceedings in rem for the offence of extortion, the public prosecutor in charge of that case adopted, on the basis of a report of the police force in charge of the investigation, an order that no further action be taken ('the order that no further action be taken in the case'). That order was not challenged by the complainants within the prescribed time limits. In addition, the request to reopen the proceedings made by the Chief Prosecutor was not confirmed by the pre-trial chamber of the court with jurisdiction.

In case 47/P/2016, criminal proceedings were brought in personam against NR for the offence of passive corruption, which resulted in the adoption, by the Tribunalul Olt (Regional Court, Olt, Romania), of a judgment sentencing NR to a suspended term of imprisonment. On an appeal brought by NR, that judgment was set aside by the Court of Appeal, Craiova, the referring court, by the judgment in a criminal matter No 1207/2020, on the ground of a purported infringement of the principle ne bis in idem enshrined in Article 50 of the Charter.

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[1] According to that provision, 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

Seised of an appeal on a point of law brought by the Parchet de pe lângă Curtea de Apel Craiova (Public Prosecutor's Office at the Court of Appeal, Craiova, Romania) against that latter judgment, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) considered, in essence, that the referring court was wrong to have concluded that the principle ne bis in idem was applicable since the order that no further action be taken in the case had not been preceded by any determination as to the merits of case 673/P/2016 and had not been duly reasoned, with the result that it could not be regarded as having resulted in the barring of any further public prosecution. That court therefore set aside criminal judgment No 1207/2020 and referred the case to the referring court for reconsideration.

In the context of that reconsideration, the referring court decided to refer a question to the Court regarding the applicability of the principle ne bis in idem enshrined in Article 50 of the Charter in circumstances such as those at issue in the main proceedings.

Findings of the Court

The Court recalls that the application of the principle ne bis in idem is subject to a twofold condition, namely, first, that there must be a prior final decision (the 'bis' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the 'idem' condition).

As regards the 'bis' condition, for a person to be regarded as someone who has been 'finally acquitted or convicted' in relation to the acts which he or she is alleged to have committed, within the meaning of Article 50 of the Charter, it is necessary, in the first place, that further prosecution has been definitively barred, in accordance with national law. In the present case, to the extent that, first, the order that no further action be taken in the case was not challenged by the complainants in the main proceedings within the prescribed time limits and, secondly, the request for confirmation of the re-opening of criminal proceedings ordered by the Chief Prosecutor of the Court of First Instance of Slatina was rejected, it appears that, in case 673/P/2016, further public prosecution was definitively barred and that the order that no further action be taken in the case has become final, subject to the verifications which it is for the referring court to make.

In the second place, for it to be possible to regard a person as having been 'finally acquitted or convicted' in relation to the acts which he or she is alleged to have committed, within the meaning of Article 50 of the Charter, it is necessary that the order barring further public prosecution was adopted following a determination as to the merits of case and not on the basis of merely procedural grounds. In the present case, the condition relating to the determination as to the merits of case 673/P/2016 may be regarded as satisfied by the order that no further action be taken in the case only to the extent that that order contains an assessment of the material elements of the offence alleged, such as, inter alia, an analysis of the criminal liability of NR, as the alleged perpetrator of that offence. The failure to interview witnesses present at the meeting of the cooperative company BX on 30 April 2015 could constitute an indication of the lack of such an examination, subject to the verifications which it is for the referring court to carry out.

As regards the 'idem' condition, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence. In that regard, the Court states that in order to determine whether a person has been 'finally acquitted or convicted', within the meaning of that Article 50, it must be clear from the decision adopted that, during the investigation that preceded that decision, irrespective of whether that investigation was brought in rem or in personam, his or her legal situation as criminally liable for the acts constituting the offence being prosecuted was examined and, in the case of an order that no further action be taken, rejected. If that is not the case, which it is for the referring court to ascertain, the principle ne bis in idem does not apply and, consequently, that person cannot be regarded as having been finally acquitted, within the meaning of Article 50 of the Charter

II. INSTITUTIONAL PROVISIONS: NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

Judgment of the Court of Justice (Fifth Chamber), 11 January 2024, Planistat Europe and Charlot v Commission, C-363/22 P

Link to the full text of the judgment

Appeal – Second paragraph of Article 340 TFEU – Non-contractual liability of the European Union – Regulation (EC) No 1073/1999 – Investigations conducted by the European Anti-Fraud Office (OLAF) – External investigation by OLAF – 'Eurostat' case – Forwarding by OLAF of information concerning matters liable to result in criminal proceedings to the national judicial authorities before the conclusion of the investigation – Filing of a complaint by the European Commission before the conclusion of the OLAF investigation – National criminal proceedings – Ruling that there is no need to adjudicate which has become final – Concept of a 'sufficiently serious breach' of a rule of EU law intended to confer rights on individuals – Material and non-material damage allegedly suffered by the appellants – Actions for damages

By upholding in part the appeal brought by Planistat Europe SARL and Mr Charlot ('the appellants') against the judgment of the General Court in Planistat Europe and Charlot v Commission [2] ('the judgment under appeal'), the Court of Justice rules, inter alia, on the scope of the judicial review to be carried out by the General Court in the context of an action to establish non-contractual liability, based on the second paragraph of Article 340 TFEU, first, where the European Anti-Fraud Office (OLAF) forwarded information to the national judicial authorities pursuant to Regulation No 1073/1999 [3] and allegedly made false accusations, whereas the national courts subsequently dismissed the proceedings against the persons concerned and, secondly, where the European Commission lodged a complaint with an application to join the proceedings as a civil party.

In 1996, the Statistical Office of the European Communities (Eurostat) created a network of sales outlets for statistical information (datashops). In the Member States, those datashops, which lack legal personality, were in principle integrated within the national statistical institutes, with the exception of Belgium, Spain and Luxembourg where they were managed by commercial companies. From 1996 to 1999, Planistat Europe, directed by Mr Charlot, benefited from framework contracts signed with Eurostat for various services including, in particular, the supply of staff within the datashops. From 1 January 2000, Planistat Europe was entrusted with the management of the datashops in Brussels (Belgium), Madrid (Spain) and Luxembourg (Luxembourg).

In September 1999, the Eurostat Internal Audit Service issued a report finding irregularities in Planistat Europe's management of the datashops. On 17 March 2000, the Commission forwarded that report to OLAF. On 18 March 2003, following an internal investigation, OLAF decided to open an external investigation concerning Planistat Europe and, the following day, forwarded to the French judicial authorities information relating to matters liable, in its view, to be characterised as criminal in the context of the ongoing investigation ('the note of 19 March 2003'). On that basis, on 4 April 2003, the public prosecutor in Paris (France) opened an investigation file before the investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris, France) in relation to the offences of

2 Judgment of 6 April 2022, Planistat Europe and Charlot v Commission (T-735/20, EU:T:2022:220).

3 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1).

misappropriation and complicity in breach of trust. That forwarding of information was mentioned in the press in May 2003.

The Commission and OLAF subsequently issued several press releases, only two of which mentioned Planistat Europe. Thus, the press release of 9 July 2003 made reference to Planistat Europe for the first time, whereas, in the press release of 23 July 2003, the Commission confirmed its decision to terminate the contracts concluded with Planistat Europe. On 10 July 2003, the Commission filed a complaint against X with the public prosecutor in Paris for breach of trust and all other offences that could be inferred from the facts set out in that complaint and applied to join the proceedings as a civil party. On 10 September 2003, Mr Charlot was put under investigation for breach of trust and misappropriation. On 23 July 2003, the Commission terminated the contracts concluded with Planistat Europe. On 25 September 2003, OLAF closed both the internal investigation and the external investigation.

On 9 September 2013, the investigating judge of the tribunal de grande instance de Paris (Regional Court, Paris) made an order dismissing the proceedings against all the persons under investigation before the French judicial authorities. By judgment of 23 June 2014, the cour d'appel de Paris (Court of Appeal, Paris, France) dismissed the Commission's appeal against that order and upheld the dismissal order. By judgment of 15 June 2016, the Cour de cassation (Court of Cassation, France) dismissed the Commission's appeal against the judgment of the cour d'appel de Paris (Court of Appeal, Paris), thereby bringing the legal proceedings to an end.

On 10 September 2020, the appellants sent the Commission a letter of formal notice calling on it to pay them a sum of money by way of compensation for the damage allegedly suffered as a result, inter alia, of the complaint filed by the Commission and the press releases issued in that regard. On 15 October 2020, the Commission rejected that request, finding that the conditions for the European Union to incur non-contractual liability were not satisfied.

The appellants then brought an action before the General Court under Article 268 TFEU seeking compensation, first, for the non-material damage suffered by Mr Charlot as a result of OLAF's forwarding to the national authorities of the note of 19 March 2003 and of the complaint lodged by the Commission before those authorities before the OLAF investigation had been closed and, secondly, for the material damage resulting from the termination of the contracts concluded between Planistat Europe and the Commission. In support of that action, the appellants submitted that OLAF and the Commission had, inter alia, infringed the principle of good administration, as enshrined in the Charter of Fundamental Rights of the European Union ('the Charter'). According to the appellants, the wrongful acts committed by OLAF and the Commission had a direct causal link with the non-material and material damage for which they sought compensation. By the judgment under appeal, the General Court dismissed their action as inadmissible on account of the five-year limitation period laid down in Article 46 of the Statute of the Court of Justice in so far as that action sought compensation for the material damage and non-material damage resulting from the media coverage of Mr Charlot's name. As to the remainder, the General Court dismissed that action as unfounded in so far as it sought compensation for the non-material damage resulting from the criminal proceedings brought against Mr Charlot before the French judicial authorities. The appellants then brought an appeal before the Court of Justice.

Findings of the Court

After rejecting the appellants' arguments seeking to call into question the General Court's application of the rules on limitation periods, the Court of Justice notes, as regards the compensation sought for the non-material damage resulting from the criminal proceedings brought before the French judicial authorities, that the conditions that must be satisfied in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU include the requirement of a sufficiently serious breach of a rule of law intended to confer rights on individuals. That requirement is satisfied where the institution concerned manifestly and gravely disregarded the limits set on its discretion. The factors to be taken into consideration in that connection are the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authorities. The right to good administration, enshrined in Article 41 of the Charter, includes a duty of care on the part of the EU administration, which must act with care and caution, and failure to comply with that obligation constitutes a breach of a rule of law intended to confer rights on individuals.

As regards, more specifically, the implications of the principle of good administration and of the duty of care inherent therein, with respect to the possibility for OLAF to forward information to the national judicial authorities, it is apparent from Article 10(1) of Regulation No 1073/1999 that '[OLAF] may at any time forward to the competent authorities of the Member States concerned information obtained in the course of external investigations'. It is also apparent from recital 1 of that regulation that that power must be exercised in the light of the objectives of protecting the financial interests of the European Union and combating fraud and any other illegal activities detrimental to the financial interests of the European Union.

In addition, according to recital 5 of that regulation, OLAF's responsibility extends beyond the protection of financial interests to include all activities relating to safeguarding EU interests against irregular conduct liable to result in administrative or criminal proceedings. It is therefore in order to achieve those objectives that OLAF carries out internal and external investigations, the results of which are, according to Article 9 of that regulation, presented in an investigation report sent to the competent authorities of the Member States, in the case of an external investigation, or to the institution, body, office or agency concerned, in the case of an internal investigation, in accordance with paragraphs 3 and 4 of that article.

In that regard, the Court notes that, in accordance with Article 9(2) of Regulation No 1073/1999, reports drawn up by OLAF 'shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors'. It follows, as confirmed by recital 13 of Regulation No 1073/1999, that the findings of an OLAF investigation set out in a final report do not lead automatically to the initiation of judicial proceedings, since the competent authorities are free to decide what action to take pursuant to that report and are accordingly the only authorities having the power to adopt decisions capable of affecting the legal position of those persons in relation to which that report recommended that such proceedings be instigated. The material supplied by OLAF may be supplemented and verified by the national authorities, which have a wider range of investigative powers than OLAF.

The Court therefore concludes from this that, while it is indeed true that OLAF has not only the power, but also the obligation to forward to the competent national authorities, including judicial authorities, even before the closure of its investigation and the drafting of the final report, any relevant information that may justify the adoption of measures by those authorities, including the opening of a criminal investigation, the fact remains that when it takes the decision to forward such information, OLAF must take account of its duty of care and exercise a certain degree of caution, since OLAF does not act as an 'ordinary whistle-blower', but as an office vested with powers of investigation, and such forwarding of information takes place between two authorities with such powers. That is all the more so since bringing the matter before the national authorities may serve as a basis for the initiation of civil and criminal judicial proceedings.

It follows that, in order to comply with its duty of care, OLAF must, before forwarding information to the national authorities under Regulation No 1073/1999, ensure, in accordance with recital 10 of that regulation, that the information in question is sufficiently plausible and credible to justify the adoption, by those authorities, of measures falling within their competence, including, as the case may be, the opening of a judicial investigation. It follows that where, as in the present case, the General Court is called upon to determine whether OLAF has complied with its duty of care as regards the forwarding of information to the national authorities, it must verify that, at the time of that forwarding, OLAF had more than a mere suspicion, without however requiring established proof which no longer requires any investigation.

Accordingly, in the present case, the Court considers that it was for the General Court, first, to verify the credibility and content of the information or material in the note of 19 March 2003 and the intention with which that information or that material was forwarded to the French judicial authorities and, secondly, to determine whether that information or material could justify the opening of a judicial investigation or constitute evidence relevant to such an investigation. To that end, it was for the General Court to establish whether OLAF had sufficiently precise material evidence showing that there were plausible reasons to consider that the information forwarded concerned matters liable to be characterised as criminal.

Taking the view that the General Court did not verify either the credibility and content of the information or the material in the note of 19 March 2003, the intention with which that information or that material was forwarded to the French judicial authorities, or whether that information or that material could justify the opening of a judicial investigation or constitute evidence relevant to such an investigation, the Court of Justice holds that, to that extent, the General Court erred in law. Furthermore, it holds that the General Court erred in law when it rejected as ineffective the appellants' arguments alleging that OLAF and the Commission made false accusations.

Accordingly, the Court of Justice sets aside the judgment under appeal in so far as, by that judgment, the General Court rejected the appellants' action, to the extent that it sought compensation for the non-material damage allegedly suffered by Mr Charlot as a result of the criminal proceedings initiated against him before the French judicial authorities. The Court of Justice dismisses the appeal as to the remainder.

Noting that, in the judgment under appeal, the General Court concluded that there was no sufficiently serious breach of a rule of EU law, without going on to examine the other conditions which must all be met in order for the European Union to incur non-contractual liability, the Court of Justice considers, in those circumstances, that the state of the proceedings in the present dispute does not permit final judgment to be given.

Consequently, it refers the case back to the General Court, so that it may carry out a new examination of the possible existence of a sufficiently serious breach of a rule of EU law to incur the European Union's non-contractual liability. If that examination shows that there is such a breach, the General Court will have the task of examining the other conditions which must be met in order for the European Union to incur non-contractual liability.

III. PROCEEDINGS OF THE EUROPEAN UNION: REFERENCES FOR A PRELIMINARY RULING

Judgment of the Court of Justice (Grand Chamber), 9 January 2024, G. and Others (Appointment of judges of the ordinary courts in Poland), C-181/21 and C-269/21

Link to the full text of the judgment

Reference for a preliminary ruling – Article 267 TFEU – Possibility for the referring court to take account of the preliminary ruling of the Court – Interpretation sought by the referring court necessary to enable it to give judgment – Independence of the judiciary – Conditions for the appointment of judges of the ordinary courts – Possibility of challenging an order which has definitively ruled on an application for the grant of interim measures – Possibility of removing a judge from a panel of judges of the court – Inadmissibility of the requests for a preliminary ruling

The Grand Chamber of the Court rules that two requests for a preliminary ruling submitted by Polish judges, which question whether the composition of the panel of judges, in the cases in the main proceedings, complies with the requirements inherent in an independent and impartial tribunal within the meaning of EU law, are inadmissible.

In the first case (C-181/21), a panel of three judges at the Sąd Okręgowy w Katowicach (Regional Court, Katowice, Poland) was appointed to examine a complaint against an order dismissing a consumer's objection to an order for payment. The Judge-Rapporteur in charge of that case expressed doubts as to the status of that panel of judges as a 'court', in view of the circumstances in which Judge A.Z. was appointed to the Regional Court, Katowice, Judge A.Z. also being part of that panel. The Judge-Rapporteur's concerns related, inter alia, to the status and method of operation of

the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS' [4]), which is involved in such an appointment procedure.

As regards Case C-269/21, a panel of three judges sitting within the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) examined the complaint lodged by a bank against an order by which a panel consisting of a single judge in that same court had granted an application for interim measures brought by consumers. That formation of three judges varied the order under appeal, rejected that request in its entirety and referred the case back to the panel consisting of a single judge. That panel consisting of a single judge has doubts as to the compatibility with EU law of the composition of the panel of judges which ruled on the bank's complaint and, consequently, as to the validity of its decision. The panel of three judges comprised Judge A.T., appointed to the Regional Court of Krakow in 2021, following a procedure involving the KRS.

In that context, the Judge-Rapporteur, in the first case, and the single-judge formation in the second case, decided to refer questions to the Court for a preliminary ruling seeking to ascertain, in essence, whether, in the light of the particular circumstances in which the appointments of Judges A.Z. and A.T. were made, the panels in which those judges sit meet the requirements inherent in an independent and impartial tribunal previously established by law, within the meaning of EU law, and whether EU law [5] requires such judges to be excluded of the court's own motion from the examination of the cases in question.

Findings of the Court

At the outset, The Court recalls that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless, inter alia, a case is pending before that national court in which the latter is called upon to give a decision which is capable of taking account of the preliminary ruling [6].

The Court then notes that, although it is true that every court is obliged to verify whether, in its composition, it constitutes an independent and impartial tribunal previously established by law, within the meaning, in particular, of the second subparagraph of Article 19(1) TEU, where a serious doubt arises on that point, the fact remains that the necessity, within the meaning of Article 267 TFEU, of the interpretation sought from the Court for a preliminary ruling means that the referring judge must be able, alone, to infer the consequences of that interpretation by assessing, in the light of that interpretation, the lawfulness of the appointment of another judge to the same panel and, where appropriate, by recusal of the latter.

That is not the case, in that respect, of the referring judge in Case C-181/21 since it is not apparent from the order for reference or from the documents before the Court that, under the rules of national law, the judge which made the reference for a preliminary ruling in that case could, alone, act in that way. The interpretation of the provisions of EU law sought in Case C-181/21 does not therefore meet an objective need linked to a decision which the referring judge might take, alone, in the case in the main proceedings.

As regards Case C-269/21, the Court notes that the referring court itself points out that the order made by the panel of three judges which varied its own decision and rejected the application for interim measures made by the consumers concerned is no longer subject to appeal and must therefore be regarded as final under Polish law. Although it relies on the legal uncertainty which surrounds that order due to doubts as to the lawfulness of the composition of the panel which issued

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4 In its composition after 2018.

5 See Article 2 and Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union.

6 Judgment of 22 March 2022, Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Appointment) (C-508/19, EU:C:2022:201, paragraph 62 and the case-law cited).

it, the referring court does not, however, put forward any provision of Polish procedural law which would confer on it the competence to carry out, moreover in a formation of one sole judge, an examination of the conformity, in particular with EU law, of a final order given on such a request by a panel of three judges. It is also apparent from the file before the Court that the order made by the panel of three judges is binding on the referring judge and that the latter does not have jurisdiction to 'recuse' a judge forming part of the panel of judges which made that order or to call that order into question.

Thus, the Court finds that the referring court in Case C-269/21 does not have jurisdiction, under the rules of national law, to assess the legality, in the light, in particular, of EU law, of the panel of three judges which made the order definitively ruling on the application for interim measures and, in particular, the conditions for the appointment of Judge A.T., and to call into question, where appropriate, that order.

Since the request for the grant of interim measures by the applicants in the main proceedings was rejected in its entirety, that request was definitively dealt with by the panel of three judges. The questions referred in Case C-269/21 therefore relate intrinsically to a stage in the procedure in the main proceedings which has been definitively closed and is separate from the main proceedings, which remains the only stage pending before the referring court. The questions referred do not therefore correspond to an objective need inherent in the resolution of that dispute, but seek to obtain from the Court a general assessment, disconnected from the needs of that dispute, of the procedure for the appointment of ordinary judges in Poland.

IV. PROTECTION OF PERSONAL DATA

Judgment of the Court of Justice (Third Chamber), 11 January 2024, État belge (Data processed by an official journal), C-231/22

Link to the full text of the judgment

Reference for a preliminary ruling – Approximation of laws – Protection of natural persons with regard to the processing of personal data and free movement of such data (General Data Protection Regulation) – Regulation (EU) 2016/679 – Point 7 of Article 4 – Concept of 'controller' – Official journal of a Member State – Obligation to publish as they stand company documents prepared by companies or their legal representatives – Article 5(2) – Successive processing of the personal data contained in such documents by several separate persons or entities – Determination of responsibilities

Ruling on a request for a preliminary ruling from the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium), the Court of Justice clarifies, first, the scope of the concept of 'controller' and, second, the limits of the responsibilities of a controller, where processing of the same personal data is performed by successive entities.

On 12 February 2019, the *Moniteur belge*, which ensures in Belgium the production and dissemination of a wide range of official and public publications in paper format and electronically, published an extract from a decision of a company concerning a reduction in its capital. That extract, drawn up by

the notary of a partner of the company and sent on to the court having jurisdiction, which, in turn, sent it for publication to the Office of that official journal, contained personal data of that partner.

After finding that the passage containing his data had been included in the extract as a result of an error made by the notary, the data subject requested to have that passage deleted on the basis of his right to erasure. [7] However, the service public fédéral Justice (Federal Public Service Justice; 'the FPS Justice'), to which the Office of the *Moniteur belge* is attached, refused to grant his request. Following that refusal, that data subject lodged a complaint against the FPS Justice with the Autorité de protection des données (Data Protection Authority, Belgium; 'the DPA'). By decision of 23 March 2021, the DPA ordered the FPS Justice to comply with the request for erasure as soon as possible. The État belge (Belgian State) then brought an action before the cour d'appel de Bruxelles (Court of Appeal, Brussels) seeking the annulment of the DPA's decision.

In that context, the cour d'appel de Bruxelles (Court of Appeal, Brussels) has asked the Court whether the *Moniteur belge* may be classified as a 'controller' [8] and whether it must be regarded as solely responsible for compliance with the principles relating to processing of data [9] or whether that responsibility is also incumbent cumulatively on the entities that have previously processed the data contained in the passage concerned.

Findings of the Court

In the first place, as regards the question whether the agency or body responsible for the official journal of a Member State such as the *Moniteur belge* may be classified as a 'controller' within the meaning of the GDPR, the Court states that, having regard to the broad definition of that concept, the determination of the purposes and means of the processing and, where appropriate, the nomination of the controller by national law may not only be explicit but also implicit. In the latter case, that determination must nevertheless be derived with sufficient certainty from the role, task and powers conferred on the agency or body concerned.

The Court finds that, in the present case, Belgian law has determined, at least implicitly, the purposes and means of the processing of personal data performed by the *Moniteur belge*. It follows that the Moniteur belge may be considered to be the 'controller'.

The Court emphasises that that conclusion is not called into question by the fact that the *Moniteur belge* does not have legal personality or by the fact that, pursuant to national law, it does not check, prior to their publication, the personal data contained in the acts and documents that it receives.

While it is true that that body must publish the document in question as it stands, it is that body alone that undertakes that task and then disseminates the act or document concerned. The publication of such acts and documents without any possibility of checking or amending their content is intrinsically linked to the purposes and means of processing determined by national law. The role of that official journal is confined to informing the public of the existence of those acts and documents, as they stand when sent to that official journal in the form of copies in accordance with the applicable national law, so as to make them enforceable against third parties. Moreover, it would be contrary to the objective of point 7 of Article 4 of the GDPR to exclude the official journal of a Member State from the concept of 'controller' on the ground that it does not exercise control over the personal data contained in its publications.

In the second place, as regards the question whether a body such as the *Moniteur belge* must be regarded as solely responsible for compliance with the principles relating to processing of personal

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7 Provided for in Article 17 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

8 Within the meaning of point 7 of Article 4 of the GDPR.

9 Under Article 5(2) of the GDPR.

data set out in the GDPR, [10] the Court observes that the processing that was entrusted to the *Moniteur belge* is both subsequent to the processing performed by the notary and by the registry of the court having jurisdiction and technically different from the processing performed by those two entities in that it is additional to it. The operations performed by the *Moniteur belge* are entrusted to it by national legislation and involve inter alia the digital transformation of the data contained in the acts or extracts of acts submitted to it and the publication, the making widely available to the public and the storage of those data. Therefore, the Moniteur belge must be considered to be responsible for compliance with all the obligations imposed on the controller by the GDPR.

In addition, the Court recalls that point 7 of Article 4 of the GDPR provides not only that the purposes and means of the processing of personal data may be determined jointly by several persons as controllers, but also that national law may determine those purposes and means and nominate the controller or provide for the specific criteria for its nomination. Thus, in connection with a chain of processing operations that are performed by different persons or entities and relate to the same personal data, national law may determine the purposes and means of all the processing operations performed successively by those different persons or entities in such a way that they are regarded jointly as controllers.

The Court emphasises that, under the GDPR, [11] the joint responsibility of several actors in a processing chain concerning the same personal data may be established by national law provided that the various processing operations are linked by purposes and means determined by national law and that national law determines the respective responsibilities of each of the joint controllers. Such a determination of the purposes and means linking the various processing operations performed by several actors in a chain and of their respective responsibilities may be made not only directly but also indirectly by national law, provided that, in the latter case, it can be inferred in a sufficiently explicit manner from the legal provisions governing the persons or entities concerned and the processing of the personal data that they perform in connection with the processing chain imposed by that law.

Thus, the Court concludes that the agency or body responsible for the official journal of a Member State, classified as a 'controller', is solely responsible for compliance with the principles set out in the GDPR as regards the personal data processing operations that it is required to perform under national law, unless joint responsibility with other entities in respect of those operations arises under that law.

Judgment of the Court of Justice (Grand Chamber), 16 January 2024 Österreichische Datenschutzbehörde, C-33/22

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Article 16 TFEU – Regulation (EU) 2016/679 – Article 2(2)(a) – Scope – Exclusions – Activities which fall outside the scope of Union law – Article 4(2) TEU – Activities concerning national security – Committee of inquiry set up by the parliament of a Member State – Article 23(1)(a) and (h), Articles 51 and 55 of Regulation (EU) 2016/679 – Competence of the supervisory authority responsible for data protection – Article 77 – Right to lodge a complaint with a supervisory authority – Direct effect

10 Principles laid down in the form of obligations in Article 5(1) of the GDPR.

11 Under a combined reading of Article 26(1) and of Article 4 point 7 of the GDPR.

Ruling on a request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the Court of Justice, sitting as the Grand Chamber, holds that the activity of a parliamentary committee of inquiry does not fall outside the scope of the GDPR. [12]

In order to examine whether there was any political influence over the Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (Federal Office for the Protection of the Constitution and for Counterterrorism, Austria), [13] the Nationalrat (National Council, Austria) set up a committee of inquiry ('the BVT Committee of Inquiry'). That committee heard WK as a witness. Despite his request for anonymisation, the minutes of his hearing, referring to his full family and first names, were published on the website of the Parlament Österreich (Austrian Parliament). Claiming that that disclosure of his identity was contrary to the GDPR and to Austrian legislation, [14] WK lodged a complaint with the Österreichische Datenschutzbehörde (Data Protection Authority, Austria) ('the Datenschutzbehörde'). By a decision of 18 September 2019, the Datenschutzbehörde declared that it lacked competence to decide on the complaint, stating that the principle of the separation of powers precluded it, as a body of the executive, from being able to exercise scrutiny over the BVT Committee of Inquiry, which is a part of the legislature.

Following the decision of the Bundesverwaltungsgericht (Federal Administrative Court, Austria), which had upheld WK's action and annulled the decision of the Datenschutzbehörde, the latter brought an appeal on a point of law (Revision) before the Verwaltungsgerichtshof (Supreme Administrative Court) against the decision of the Bundesverwaltungsgericht (Federal Administrative Court).

In that context, the referring court asked the Court whether the activities of a committee of inquiry set up by the parliament of a Member State fall within the scope of the GDPR and whether that regulation applies where those activities concern the protection of national security. Furthermore, it asked the Court to rule on whether the GDPR confers on a national supervisory authority such as the Datenschutzbehörde the competence to hear complaints relating to the processing of personal data by a committee of inquiry in the course of its activities.

Findings of the Court

In the first place, the Court recalls that Article 2(2)(a) of the GDPR, which provides that that regulation does not apply to the processing of personal data in the course of an activity which falls outside the scope of EU law, has the sole purpose of excluding from its scope the processing carried out by State authorities in the course of an activity which is intended to safeguard national security or which can be classified in the same category. Thus, the mere fact that an activity is characteristic of the State or of a public authority is not sufficient automatically to preclude the application of the GDPR to such an activity. [15]

That interpretation, which follows from the absence of any distinction depending on the identity of the controller concerned, is borne out by Article 4(7) of the GDPR. [16]

The Court states that the parliamentary nature of the BVT Committee of Inquiry does not mean that its activities fall outside the scope of the GDPR. The exception provided for in Article 2(2)(a) of that regulation refers only to categories of activities which, by their nature, fall outside the scope of EU law,

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12 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

13 On 1 December 2021, that entity became the Direktion Staatsschutz und Nachrichtendienst (Directorate State Protection and Intelligence Services, Austria).

14 Namely Paragraph 1 of the Datenschutzgesetz (Law on Data Protection) of 17 August 1999 (BGBl. I, 165/1999).

15 Judgments of 22 June 2021, Latvijas Republikas Saeima (Penalty points) (C-439/19, EU:C:2021:504, paragraph 66), and of 20 October 2022, Koalitsia 'Demokratichna Bulgaria – Obedinenie' (C-306/21, EU:C:2022:813, paragraph 39).

16 That article defines the concept of 'controller' as 'the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data'.

and not to categories of persons. Accordingly, the fact that the processing of personal data is carried out by a committee of inquiry set up by the parliament of a Member State in the exercise of its power of scrutiny over the executive does not make it possible, as such, to establish that that processing is carried out in the course of an activity which falls outside the scope of EU law.

In the second place, the Court states that, although it is for the Member States to define their essential security interests and to take appropriate measures to ensure them, [17] the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from the need to comply with EU law. The exception provided for in Article 2(2)(a) of the GDPR refers only to categories of activities which, by their nature, fall outside the scope of EU law. In that regard, the fact that the controller is a public authority whose main activity is to safeguard national security cannot suffice, as such, to exclude from the scope of the GDPR the processing of personal data that it carries out in the course of its other activities.

In the present case, the political scrutiny exercised by the BVT Committee of Inquiry does not appear to constitute, as such, an activity intended to safeguard national security or falling within the same category. Accordingly, subject to verification by the referring court, that activity does not fall outside the scope of the GDPR.

That said, a parliamentary committee of inquiry can have access to personal data which, for reasons of national security, must enjoy specific protection. In that regard, restrictions on the obligations and rights flowing from the GDPR may be laid down, by way of a legislative measure, to safeguard, inter alia, national security. [18] Restrictions concerning the collection of personal data, the provision of information to data subjects and their access to those data, or the disclosure of those data, without the consent of the data subjects, to persons other than the controller, could thus be justified on that basis, on the condition that such restrictions respect the essence of the fundamental rights and freedoms of data subjects and are a necessary and proportionate measure in a democratic society.

The Court notes that it is nevertheless not apparent from the information available to it that the BVT Committee of Inquiry alleged that the disclosure of the personal data of the data subject was necessary for the safeguarding of national security and had its basis in a national legislative measure laid down to that end, which it is, as the case may be, for the referring court to ascertain.

In the third and last place, the Court states that the provisions of the GDPR relating to the competence of national supervisory authorities and to the right to lodge a complaint [19] do not require the adoption of national implementing measures and are sufficiently clear, precise and unconditional to have direct effect. It follows that, while the GDPR leaves a margin of discretion to the Member States as regards the number of supervisory authorities to be established, [20] it determines, by contrast, the extent of their competences to monitor the application of the GDPR. Thus, where a Member State decides to establish a single national supervisory authority, that authority necessarily has all the competences provided for by that regulation. Any other interpretation would undermine the effectiveness of those provisions and risk weakening the effectiveness of all the other provisions of the GDPR that may be the subject of a complaint.

As regards the fact that national constitutional provisions preclude the possibility for a supervisory authority which is part of the executive branch to monitor the application of the GDPR by a body which is part of the legislature, the Court points out that it is precisely with due regard for the constitutional structure of the Member States that the GDPR merely requires Member States to establish at least one supervisory authority, while offering them the possibility of establishing more

17 In accordance with Article 4(2) TEU.

18 Pursuant to Article 23 of the GDPR.

19 Article 55(1) and Article 77(1) of the GDPR, respectively.

20 In accordance with Article 51(1) of the GDPR.

than one. That regulation thus grants each Member State a margin of discretion enabling it to establish as many supervisory authorities as may be required, in particular, in the light of its constitutional structure.

Furthermore, a Member State's reliance on rules of national law cannot be allowed to undermine the unity and effectiveness of EU law. The effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, in particular, provisions of domestic law, including constitutional provisions, being able to prevent that. [21]

Thus, where a Member State has chosen to establish a single supervisory authority, it cannot rely on provisions of national law, be they constitutional in nature, in order to exclude the processing of personal data coming within the scope of the GDPR from the supervision of that authority.

V. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court of Justice (Grand Chamber), 16 January 2024, Intervyuirasht organ na DAB pri MS (Women victims of domestic violence), C-621/21

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Common asylum policy – Directive 2011/95/EU – Qualification for refugee status – Article 2(d) – Reasons for persecution – 'Membership of a particular social group' – Article 10(1)(d) – Acts of persecution – Article 9(1) and (2) – Link between the reasons for and acts of persecution or between the reasons for persecution and the absence of protection against such acts – Article 9(3) – Non-State actors – Article 6(c) – Qualification for subsidiary protection – Article 2(f) – 'Serious harm' – Article 15(a) and (b) – Assessment of applications for international protection for the purpose of granting refugee status or subsidiary protection status – Article 4 – Gender-based violence against women – Domestic violence – Threat of 'honour killing'

Ruling on a request for a preliminary ruling, the Court, sitting as the Grand Chamber, has provided clarification on one of the reasons for persecution capable of leading to the recognition of refugee status, namely 'membership of a particular social group', [22] where the applicant for international protection is a woman who claims a fear, if she were to return to her country of origin, of being killed or subjected to acts of violence inflicted by a member of her family or community due to the alleged transgression of cultural, religious or traditional norms.

WS is a Turkish national of Kurdish origin. She arrived legally in Bulgaria in June 2018 and thereafter joined a family member in Germany, where she lodged an application for international protection. Following a request from the German authorities, WS was taken back by the Bulgarian authorities for

21 Judgment of 22 February 2022, RS (Effect of the decisions of a constitutional court) (C 430/21, EU:C:2022:99, paragraph 51 and the case-law cited).

22 Under Article 2(d) of Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

the purpose of examining her application for international protection, pursuant to a decision adopted in February 2019 by the National Agency for Refugees [23] ('the DAB').

During interviews conducted in October 2019, WS stated that she had been forcibly married at the age of sixteen and subjected to domestic violence. WS fled the marital home in September 2016. In 2017, she entered into a religious marriage and, in May 2018, had a son from that marriage. After she left Türkiye, she officially divorced her first husband in September 2018, despite his objections. She states that, for those reasons, she fears that his family would kill her if she were to return to Türkiye.

By a decision adopted in May 2020, the President of the DAB rejected WS's application for international protection, taking the view, first, that the conditions for granting refugee status had not been satisfied. The reasons relied on by WS, in particular the acts of domestic violence or death threats made against her were not relevant because they could not be linked to any of the reasons for persecution set out in the Law on Asylum and Refugees, which transposes Directive 2011/95 into Bulgarian law. Furthermore, WS did not claim to have been persecuted based on her gender.

Second, WS was refused subsidiary protection status. It was considered that she did not satisfy the conditions required for that purpose since, in the first place, neither the official authorities nor certain non-State entities had taken action against her that the State is not in a position to control. In the second place, WS had not informed the police that she had been subject to criminal assaults, had not lodged a complaint and had left Türkiye legally.

The action brought by WS against that decision was dismissed.

In April 2021, based on new evidence, WS made a subsequent application for international protection, claiming a well-founded fear of persecution on account of her membership of a particular social group, namely women who are victims of domestic violence and women who are potential victims of honour killings, by non-State actors against whom the Turkish State is not able to defend her. Objecting to her being sent back to Türkiye, she states that she fears being the victim of an honour killing or being forced to marry again.

In May 2021, the DAB refused to reopen the procedure for granting international protection, taking the view, inter alia, that WS had not submitted any significant new evidence relating to her personal situation or her country of origin.

Hearing an appeal against that decision, the referring court decided to seek a ruling from the Court on the interpretation of Directive 2011/95, inviting it to clarify the substantive preconditions governing the grant of international protection and the type of international protection to be granted in such circumstances.

Findings of the Court

First, the Court examines whether, under Directive 2011/95, depending on the circumstances in the country of origin, women in that country may be regarded, as a whole, as belonging to 'a particular social group' as a 'reason for persecution' capable of leading to the recognition of refugee status, or whether the women concerned must share an additional common characteristic in order to be regarded as belonging to such a group.

In that regard, the Court states, first of all, that the Istanbul Convention [24] lays down obligations coming within the scope of Article 78(2) TFEU, which empowers the EU legislature to adopt measures relating to a common European asylum system, such as Directive 2011/95. Thus, that convention, in

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23 Darzhavna agentsia za bezhantsite (State Agency for Refugees, Bulgaria).

24 Council of Europe Convention on preventing and combating violence against women and domestic violence, which was concluded in Istanbul on 11 May 2011, signed by the European Union on 13 June 2017 and approved on behalf of the European Union by Council Decision (EU) 2023/1076 of 1 June 2023 (OJ 2023 L 143 I, p. 4) ('the Istanbul Convention'). That convention has been binding on the European Union since 1 October 2023.

so far as it relates to asylum and non-refoulement, is one of the treaties in the light of which that directive is to be interpreted, [25] even though some Member States, including the Republic of Bulgaria, have not ratified it.

Next, the Court points out that it is apparent from Article 10(1)(d) of Directive 2011/95 that a group is to be considered a 'particular social group' where two cumulative conditions are satisfied. In the first place, the members of the relevant group must share at least one of the three identifying features referred to by that provision. [26] In the second place, that group must have a 'distinct identity' in the country of origin.

As regards the first condition for identifying a 'particular social group', the Court states that the fact of being female constitutes an innate characteristic and therefore suffices to satisfy that condition. That does not rule out the possibility that women who share an additional common feature such as, for example, a common background that cannot be changed, [27] may also belong to that category for the purposes of that provision.

As regards the second condition for identifying a 'particular social group', the Court states that women, whether or not they share an additional common characteristic, may be perceived as being different by the surrounding society and recognised as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin.

Lastly, the Court states that membership of a 'particular social group' is to be established independently of the acts of persecution [28] of which the members of that group may be victims in the country of origin. Nevertheless, discrimination or persecution suffered by persons sharing a common characteristic may constitute a relevant factor where, in order to ascertain whether the second condition for identifying a social group is satisfied, it is necessary to assess whether the group in question appears to be distinct in the light of the social, moral or legal norms of the country of origin in question.

Consequently, women, as a whole, may be regarded as belonging to a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95, where it is established that, depending on the circumstances in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence. Furthermore, more restricted groups of women who share an additional common characteristic [29] may be regarded as belonging to a social group with a distinct identity in their country of origin if, on account of that characteristic, they are stigmatised and exposed to the disapproval of their surrounding society resulting in their social exclusion or acts of violence.

Second, the Court examines whether, where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, Directive 2011/95 requires a link to be established between the acts of persecution and at least one of the reasons for persecution referred to in Article 10(1) of Directive 2011/95. It states that, under Article 9(3) of that directive, read in conjunction with other provisions, [30] recognition of refugee status presupposes that a link be established between, on the one hand, the aforementioned reasons for persecution and, on the other, either the acts of

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25 Under Article 78(1) TFEU.

26 Namely an 'innate characteristic', a 'common background that cannot be changed' or a 'characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'.

27 The Court notes in particular that the fact that women have escaped from a forced marriage or left the marital home may, inter alia, be regarded as a common background that cannot be changed, within the meaning of that provision.

28 Within the meaning of Article 9 of Directive 2011/95.

29 As an example of an additional common characteristic, the Court refers to the situation of women who refuse forced marriages, where such a practice may be regarded as a social norm within their society, or who transgress such a norm by ending that marriage.

30 In this instance, read in conjunction with Article 6(c) and Article 7(1), in the light of recital 29 of Directive 2011/95.

persecution [31] or the absence of protection, by the 'actors of protection', [32] against acts of persecution perpetrated by 'non-State actors'. Thus, in the case of an act of persecution perpetrated by a non-State actor, the condition laid down in Article 9(3), referred to above, [33] is satisfied where that act is based on one of the reasons for persecution mentioned in Article 10(1) of that directive, even if the absence of protection is not based on those reasons. That condition must also be regarded as being satisfied where the absence of protection is based on one of the reasons for persecution set out in the latter provision, even if the act of persecution perpetrated by a non-State actor is not based on those reasons. Consequently, where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, it is not necessary to establish a link between one of the reasons for persecution referred to in Article 10(1) of Directive 2011/95 and acts of persecution, if such a link can be established between one of those reasons for persecution and the absence of protection from those acts by the actors of protection. [34]

Third, the Court holds that the concept of serious harm, [35] capable of leading to the recognition of subsidiary protection status, [36] covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms. To reach that conclusion, it states that Article 15(a) and (b) of Directive 2011/15 [37] defines 'serious harm' as 'the death penalty or execution' or 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. In view of the objective of Article 15(a) of Directive 2011/95 of ensuring protection for persons whose right to life would be threatened if they were to return to their country of origin, the term 'execution' in that provision cannot be interpreted as excluding harm to a person's life solely on the ground that it is caused by non-State actors. Thus, where a woman runs a real risk of being killed or subjected to acts of violence inflicted by a member of her family or community because of the alleged transgression of cultural, religious or traditional norms, such serious harm must be classified as 'execution' within the meaning of that provision.

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31 Within the meaning of Article 9(1) and (2) of Directive 2011/95.

32 Those 'actors of protection' are defined in Article 7 of Directive 2011/95.

33 This condition is provided for in Article 9(3) of Directive 2011/95.

34 Within the meaning of Article 7(1) of that directive.

35 Laid down in Article 15(a) and (b) of Directive 2011/95.

36 Within the meaning of Article 2(g) of Directive 2011/95.

37 Read in the light of recital 34 of Directive 2011/95.

VI. COMPETITION: AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the Court of Justice (First Chamber), 18 January 2024, Lietuvos notarų rūmai and Others, C-128/21

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Article 101 TFEU – Concepts of 'undertaking' and 'decisions of associations of undertakings' – Decisions of the chamber of notaries of a Member State fixing the methods for calculating fees – Restriction 'by object' – Prohibition – Lack of justification – Fine – Infringement on the association of undertakings and its members – Infringer

Ruling on a reference for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania, 'the referring court'), the Court of Justice clarified the extent to which decisions of a professional organisation, such as the Chamber of Notaries of a Member State, intended to regulate the calculation of the fees payable for the performance of certain activities by notaries fall within the prohibition on decisions by associations of undertakings which restrict competition laid down in Article 101 TFEU. In addition, the Court has clarified the conditions under which the members of such an association may assume liability for an infringement of competition law committed by the association.

In the present case, the governing body of the Lithuanian Chamber of Notaries, the Presidium, has adopted rules intended to clarify the methods of calculating the fees payable by notaries for the performance of certain of their activities [38]('the clarifications'). According to those clarifications, the amount of fees charged by notaries is set at the highest amount in the price range provided for in the provisional scale drawn up by the Minister for Justice of the Republic of Lithuania.

Considering that, by adopting those clarifications, the Chamber of Notaries, acting through its management body, the Presidium, and its members had indirectly fixed the amounts of the fees charged by notaries and thus infringed, inter alia, Article 101(1)(a) TFEU, the Lietuvos Respublikos konkurencijos taryba (Competition Council of the Republic of Lithuania, 'the Competition Council') fined the Chamber of Notaries and the eight notaries who were members of its Presidium by decision of 26 April 2018.

The action for annulment brought by the addressees of that decision was partially upheld at first instance. The Competition Council then appealed against the decision of the court of first instance to the referring court. It was in that context that the latter referred a number of questions to the Court for a preliminary ruling.

By those questions, the referring court asks, in essence, first of all, whether the notaries of the Republic of Lithuania, when carrying on the activities covered by the clarifications at issue, are to be regarded as 'undertakings' within the meaning of Article 101 TFEU; next, if so, whether the clarifications must be classified as decisions of an association of undertakings which restrict

38 The activities in question are as follows:

- approving mortgage transactions and affixing enforcement clauses in situations where the parties to the transaction do not indicate the value of the property subject to the mortgage and where several properties are subject to a mortgage in a single mortgage transaction;
- notarial deeds, draft transactions, consultations and technical services, in situations where an easement is established by a single contract for several properties;
- validation of an exchange contract, in situations where parts of several goods are exchanged by contract.

competition; and, finally, should such a classification be accepted, whether fines may be imposed both on the Chamber of Notaries and on each of the notaries who are members of its Presidium.

Findings of the Court

As a preliminary point, the Court considers whether it is appropriate to exclude from the outset the application of Article 101 TFEU to the main proceedings since, as the Chamber of Notaries and the Lithuanian Government submit, the clarifications are not capable of affecting trade between Member States.

In that regard, it observes that these clarifications extend to the entire territory of the Republic of Lithuania, as they are decisions of the Chamber of Notaries binding on all notaries established in that Member State. They could therefore have the effect of consolidating national divisions and thus hindering the economic interpenetration sought by the FEU Treaty. Moreover, the concept of 'trade between Member States', within the meaning of Article 101(1) TFEU, is not limited to cross-border trade in goods and services, but has a broader scope which covers any cross-border economic activity, including establishment. Even if a notary could not, in principle, provide services in a Member State other than that in which he or she is established, the fact remains that such a profession is subject to the freedom of establishment. Rules such as clarifications, which relate to a fundamental aspect of the practice of the profession of notary in the Member State concerned, are, in principle, likely to have a significant influence on the choice of nationals of other Member States to establish themselves in that first Member State in order to practise that profession. Moreover, nationals of Member States other than the Republic of Lithuania may avail themselves of the services of notaries established in the latter Member State. It follows that the clarifications at issue in the main proceedings, in so far as they should be classified as agreements between undertakings or decisions by associations of undertakings within the meaning of Article 101(1) TFEU, are capable of affecting trade between Member States within the meaning of that provision.

That being so, the Court considers, as a first step, whether Article 101 TFEU is capable of being applied in a situation such as that in the main proceedings. In order to do so, it analyses, first, whether notaries can be classified as undertakings, secondly, whether the Chamber of Notaries must be regarded as an association of undertakings and, thirdly, whether the clarifications at issue in the main proceedings must be regarded as decisions of an association of undertakings.

First of all, the Court finds that notaries established in the territory of a Member State must be classified as undertakings where they pursue activities such as those referred to in the clarifications. In so far as notaries exercise a liberal profession which involves, as their principal activity, the provision of a number of separate services for remuneration, they are, in principle, engaged in an economic activity. Moreover, the Court has already held [39] that activities such as those referred to in the clarifications [40] do not fall directly and specifically within the exercise of the prerogatives of a public authority, which is not economic in nature.

Next, the Chamber of Notaries is an association of undertakings and not a public authority. In view of the tasks conferred on it, it has the characteristics of an organisation for regulating the profession, and as such is subject to the application of competition rules. Moreover, the Presidium is composed exclusively of members of the profession who are elected solely by their peers, and the Lithuanian State does not appear to intervene either in the appointment of those members or in the adoption of its decisions. In addition, the mere fact that the Lithuanian courts may review the legality of the

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39 See to that effect: judgment of 1 February 2017, Commission v Hungary (C-392/15, EU:C:2017:73, paragraphs 119 and 120 and 125 to 127); judgment of 24 May 2011, Commission v France (C-50/08, EU:C:2011:335, paragraph 97); judgment of 1 December 2011, Commission v Netherlands (C-157/09, EU:C:2011:794, paragraph 72).

40 Namely, the notarial activity of authenticating deeds reflecting unilateral commitments or agreements freely entered into by the parties, the creation of mortgages, the simple affixing of the executory formula, as well as the preparation of draft transactions, consultations and the provision of technical services by notaries.

decisions of the Chamber of Notaries does not imply that the chamber operates under the effective control of the State.

Finally, rules such as clarifications are decisions of an association of undertakings, namely decisions which reflect the will of representatives of the members of a profession to obtain that they adopt a particular course of conduct in the course of their economic activity. Furthermore, the fixing of a price by means of a binding act must be regarded as constituting a decision for the purposes of Article 101 TFEU.

As a second step, having established that the clarifications at issue in the main proceedings can be classified as decisions of associations of undertakings, the Court examines whether they fall within the prohibition laid down in Article 101(1) TFEU.

Accordingly, the Court considers that the clarifications at issue in the main proceedings fall within the prohibition laid down in Article 101(1) TFEU in that they are capable of being regarded as constituting a restriction of competition 'by object' prohibited by that provision. A mechanism for calculating the amount of fees such as that provided for by the clarifications leads precisely to the horizontal fixing of the prices of the services concerned.

In that regard, the argument of the Chamber of Notaries and the Lithuanian Government that those clarifications pursue legitimate objectives cannot succeed in the present case. Admittedly, it is clear from the Court's case-law, in particular the judgment in Wouters and Others, [41] that certain anticompetitive conduct may be regarded as justified by the pursuit of legitimate objectives in the general interest provided that such conduct is not in itself anticompetitive and that the necessity and proportionality of the means employed to that end have been duly established. However, that case-law does not apply to conduct that is so harmful that it can be considered to have the 'object' of preventing, restricting or distorting competition within the meaning of Article 101 TFEU. With regard to such conduct, it is only the benefit of the exemption provided for in Article 101(3) TFEU that can be invoked, provided that all the conditions set out in that provision are met.

As a third step, the Court examines the question whether the Competition Council may impose a fine for an infringement of Article 101 TFEU on the Chamber of Notaries, as the association of undertakings which committed the infringement, and on each notary who is a member of that association's governing body.

On that point, the Court notes that, where the existence of an infringement of Article 101 TFEU is established, national competition authorities must, in principle, impose on the infringer a fine which is sufficiently dissuasive and proportionate. In accordance with that provision, an 'association of undertakings', such as the Chamber of Notaries, may constitute the infringer of that provision.

In the present case, it follows from the order for reference that the infringement of Article 101(1) TFEU found by the Competition Council consisted in the adoption of the clarifications by decision of the Presidium of the Chamber of Notaries. The decisions of the Presidium are binding on that Chamber, so that those decisions must be regarded as decisions of the Chamber of Notaries itself. It follows that the Chamber of Notaries must be regarded as the infringer found by the Competition Council in the main proceedings.

As far as the notaries on the Presidium are concerned, they appear to have acted solely in their capacity as members of the Presidium without having participated in any other way in the infringement thus established. However, the Competition Council had imposed individual fines on the members of the Presidium in order to ensure the dissuasive effect of the sanctions imposed for that infringement, given that the Lithuanian law applicable at the time did not permit the imposition on the Chamber of Notaries alone of a fine of a sufficiently high amount to produce that dissuasive effect.

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41 Judgment of 19 February 2002, Wouters and Others (C-309/99, EU:C:2002:98).

In that regard, the Court held that the principle of personal liability, which requires that only the entity responsible for an infringement of the competition rules be penalised, precludes such an approach. Moreover, the fact that the Lithuanian law applicable at the material time did not provide for the possibility of taking into account the turnover of the members of the Chamber of Notaries for the purposes of calculating the fine which the Competition Council was to impose on that chamber did not prevent that national competition authority from taking that turnover into account. Thus, it follows both from the case-law of the Court and from Article 23 of Regulation No 1/2003, [42] which is also relevant to the determination of the powers of the national competition authorities, in substance, that, in particular, where the infringement committed by the association of undertakings relates to the activities of its members, the fine to be imposed on that association must, in order to determine a penalty which is dissuasive, be calculated by reference to the turnover achieved by all the undertakings which are members of that association on the market affected by the infringement, even if those undertakings did not actually participate in the infringement. Furthermore, Article 23(4) of that regulation provides that, where a fine is imposed on an association of undertakings taking account of the turnover of its members and the association has not participated in the infringement, the fine is to be calculated by reference to the turnover achieved by all the undertakings belonging to that association on the market affected by the infringement, even if those undertakings did not actually participate in the infringement.

It follows that a national competition authority may not impose individual fines on undertakings which are members of the governing body of the association of undertakings which committed the infringement where those undertakings are not co-infringers.

VII. FISCAL PROVISIONS: REFUSAL OF THE RIGHT TO DEDUCT VAT

Judgment of the Court of Justice (First Chamber), 11 January 2024, Global Ink Trade, C-537/22

Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/EC – Refusal of the right of deduction – Obligations of taxable persons – Duty of diligence – Burden of proof – Principles of fiscal neutrality and legal certainty – Primacy of EU law – Conflict between the case-law of a national court and EU law

In a case concerning a refusal of the right to deduct VAT, the Court of Justice clarifies the scope of the principle of the primacy of EU law in the event of a difference of opinion between the national courts as to the implications of the Court's case-law, including where that case-law is in the form of orders under Article 99 of the Court's Rules of Procedure. The Court also summarises the guidance contained in its case-law on the refusal of the right of deduction.

In the course of its wholesale business, the undertaking Global Ink Trade had made various purchases of office supplies, primarily from a supplier called Office Builder Kft.

As the result of checks carried out, the tax authority found that the supplier in question did not carry on any real economic activity and that it had not complied with its tax obligations. On account of

42 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

uncertainty as to the true identity of that supplier, that tax authority found that the supplies of goods invoiced to Global Ink Trade had not taken place, and that accordingly credence could not be given to the invoices submitted by that undertaking. The tax authority therefore refused Global Ink Trade the benefit of the right to deduct the VAT relating to those invoices, including on the ground that, by failing to obtain sufficient information about the true identity of its supplier and the latter's compliance with its tax obligations, it had not acted with due diligence in carrying on its activity. In those circumstances, the tax authority found that Global Ink Trade had committed passive tax evasion.

Global Ink Trade brought an action before the Fővárosi Törvényszék (Budapest High Court, Hungary), which is the referring court.

By virtue of the national legislation, the referring court considers itself to be bound by earlier legal rulings of the Kúria (Supreme Court, Hungary) which, according to the referring court, restrict the right to deduct VAT by requiring all taxable persons to carry out complex and far-reaching checks as to their suppliers, in particular as regards whether those suppliers have complied with their obligations to declare and to pay VAT.

The referring court finds that the Court has interpreted the relevant provisions of Directive 2006/112 [43] in similar cases, [44] from which it can be seen that a taxable person who exercises the right to deduct VAT cannot be required to carry out such checks. Notwithstanding that interpretation of EU law provided by the Court, the Kúria (Supreme Court) has continued to apply its case-law as it existed prior to those decisions, on the ground that the Court's decisions, made in the form of orders under Article 99 of its Rules of Procedure, are not capable of containing new elements for the interpretation of EU law.

Against that background, the tax authority, likewise, has continued to impose requirements that are incompatible both with the provisions of the VAT Directive, as interpreted by the Court, and with a circular aimed at taxable persons published by that authority.

In those circumstances, the referring court decided to ask the Court:

– in the first place, in essence, whether the principle of the primacy of EU law must be interpreted as precluding national legislation according to which the legal rulings of a higher national court are binding on lower national courts, which must state reasons for any departure from those rulings, even where, in the light of an interpretation of a provision of EU law provided by the Court, those lower national courts consider those rulings to be inconsistent with EU law;

– in the second place, in essence, whether Article 167, Article 168(a) and Article 178(a) of the VAT Directive, read in the light of the principles of fiscal neutrality and legal certainty, must be interpreted as preventing a practice by which the tax authority refuses a taxable person the right to deduct the VAT relating to the acquisition of goods supplied to that taxable person, on the ground that credence cannot be given to the invoices relating to those acquisitions on account of circumstances which demonstrate a lack of diligence attributable to that taxable person and which are assessed, in principle, in the light of a circular aimed at taxable persons published by that authority;

– in the third place, in essence, whether, where a tax authority intends to refuse a taxable person the right to deduct the input VAT paid, on the ground that the taxable person concerned has participated in a VAT carousel fraud, the Vat Directive must be interpreted as precluding that tax authority from merely establishing that the transaction concerned forms part of a circular

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43 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1) ('the VAT Directive').

44 Orders of 3 September 2020, Vikingo Fővállalkozó (C-610/19, EU:C:2020:673), and of 3 September 2020, Crewprint (C-611/19, EU:C:2020:674).

invoicing chain, without identifying all the operators involved in that fraud and their respective conduct.

Findings of the Court

As regards, in the first place, the application of the principle of the primacy of EU law, the Court points out that the principle requires a national court to disregard the rulings of a higher national court if it considers, in the light of the interpretation of the provisions of EU law provided by the Court, that those rulings are not consistent with EU law, if necessary by refusing to apply the national rule requiring it to comply with the decisions of that higher court.

In order to give full effect to EU law, the national court must therefore, if necessary, alter established case-law that is based on an interpretation of national law incompatible with EU law, and must apply an interpretation of EU law apparent from clear case-law of the Court. It is irrelevant that the Court's case-law in question may be in the form of a reasoned order under Article 99 of the Court's Rules of Procedure, which has the same scope and effect as a judgment. A national court may not therefore disregard an order on the ground that, unlike a judgment, it contains no new elements for the interpretation of EU law.

In the second place, the Court clarifies that the right to deduct VAT may be refused on the ground of alleged lack of diligence by the taxable person not only where the taxable person him or herself has committed VAT fraud, but also where it is objectively established that the taxable person knew or ought to have known that, through the purchase of the goods or the services on the basis of which the right of deduction is claimed, he or she was participating in a transaction connected with such fraud.

Since a refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, tax authorities must, subject to review by national courts, and in accordance with the rules of evidence under national law, establish to the requisite legal standard the objective evidence from which it may be concluded that the taxable person is connected with VAT fraud.

In that context, only the referring court has jurisdiction to assess whether, in the light of the circumstances of the particular case, the taxable person concerned has exercised sufficient diligence and has taken the measures which may reasonably be required of him or her to satisfy him or herself that, through his or her acquisition, he or she has not participated in a transaction connected with fraud committed by a trader at an earlier stage of a transaction.

In this respect, a Member State is entitled to publish a circular in order to specify the level of diligence required and to guide the tax authorities in their assessment, provided that such a circular does not systematically undermine the right to deduct VAT and, consequently, the neutrality of VAT, and provided it does not undermine the effectiveness of EU law as regards the taking of evidence in connection with VAT fraud.

Specifically, the tax authority may not, by means of such a circular, require taxable persons to carry out complex and far-reaching checks of their suppliers – and in particular to check whether their suppliers have fulfilled their obligations to declare and pay VAT – which would have the effect of indirectly transferring to the taxable person the investigative tasks which are in principle the responsibility of the tax authority.

Such a circular must also accord with the principle of legal certainty. It is therefore for the referring court to determine whether the circular aimed at taxable persons published by the tax authority was worded unequivocally, whether its application was foreseeable by those subject to it and whether the requirements imposed by the tax authority in the exercise of its powers conflicted with the circular.

As regards, in the third place, whether a taxable person may be refused the right to deduct VAT in the context of a VAT carousel fraud, the Court notes that the tax authority must adduce sufficient evidence to establish objectively the existence of fraud and of fraudulent conduct by the taxable person, thereby precluding the use of assumptions or presumptions.

The tax authority may not, therefore, merely establish that the transaction carried out by the taxable person forms part of a circular invoicing chain. Establishing the existence of the fraud and of the

taxable person's participation in that fraud does not however necessarily entail identifying all the operators involved in the fraud and their respective conduct.

VIII. APPROXIMATION OF LAWS: PUBLIC PROCUREMENT

Judgment of the Court of Justice (Fourth Chamber), 18 January 2024, CROSS Zlín, C-303/22

Link to the full text of the judgment

Reference for a preliminary ruling – Procedures for the review of the award of public supply and public works contracts – Directive 89/665/EEC – Access to review procedures – Article 2(3) and Article 2a(2) – Obligation for Member States to provide for a review procedure with suspensive effect – Review body of first instance – Review relating to a contract award decision – Article 2(9) – Body responsible for review procedures of a non-judicial character – Conclusion of a public contract before lodging of a judicial action against a decision by that body – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial protection

Ruling on a question referred for a preliminary ruling by the Krajský soud v Brně (Regional Court, Brno, Czech Republic), the Court of Justice provides clarification as to the interpretation of Directive 89/665, [45] relating to review procedures concerning the award of public contracts, in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') relating to the right to an effective remedy.

In the context of a public contract, the Statutární město Brno (City of Brno, Czech Republic), as contracting authority, received two bids. Following the exclusion of the company CROSS Zlín a.s. for failure to meet the tender conditions, the contract was awarded to Siemens Mobility s. r. o. on 7 April 2020.

CROSS Zlín lodged an objection to the notice of exclusion, which was dismissed by decision of 4 May 2020. Following that dismissal, it applied to the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition, Czech Republic) ('the Office') for annulment of that notice of exclusion and of the decision to award the contract in question to Siemens Mobility. By decision of 5 August 2020, the Office dismissed its application. CROSS Zlín then lodged an administrative appeal against that decision, which the President of the Office, as second-instance administrative body, dismissed by decision of 9 November 2020. On 18 November 2020, the contracting authority concluded the public contract with Siemens Mobility.

Cross Zlín brought an action before the Regional Court, Brno, the referring court, against that decision of the President of the Office. In parallel to that action, CROSS Zlín lodged an application for the action to be recognised as having suspensive effect in relation to conclusion of the contract and for the

45 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1; 'Directive 89/665').

adoption of an interim measure prohibiting the contracting authority from concluding or performing that public contract. The referring court, applying Czech law, [46] dismissed that application.

Questioning whether Directive 89/665 [47] and the requirement to ensure effective judicial review deriving from Article 47 of the Charter preclude the Czech legislation, which enables a contracting authority to conclude a public contract before expiry of the period prescribed for bringing a judicial action against the decision of the second-instance administrative body or before the court hearing the case can rule on an application seeking the adoption of an interim measure prohibiting the conclusion of the contract until the ruling on that action has become final, the Regional Court, Brno referred a question to the Court for a preliminary ruling on the interpretation of that directive.

Findings of the Court

In the first place, the Court observes that Directive 89/665 contains detailed provisions laying down a coherent system of review procedures in the field of public contracts. In that regard, that directive [48] provides, first, that Member States are to ensure that persons having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement have sufficient time for effective review of the contract award decisions taken by contracting authorities by adopting the necessary provisions which respect the minimum standstill periods for conclusion of the contract [49] and, second, that when those persons apply for such a review, the contracting authority may not conclude the contract before the review body has made a decision on the application either for interim measures or for review.

The Court observes, in the second place, that it follows from that directive that the Member States are able to confer on non-judicial bodies the power to hear and determine reviews of decisions to award a public contract. In such cases, any allegedly illegal measure and any alleged defect on the part of a non-judicial review body must be capable of being the subject of judicial review or a review which is in substance judicial within the meaning of EU law. However, Directive 89/665, in laying down the obligation to suspend the conclusion of a public contract, does not make any reference to that judicial review.

In those circumstances, when a Member State decides to confer the power to determine procedures for the review of decisions awarding a public contract on a non-judicial body of first instance, the words 'review body' in Article 2(3) of that directive refer to that body. Consequently, the Member States must provide for suspension of the conclusion of the public contract concerned, either automatically until that body has ruled on the review or, at the very least, until it has decided on an application for interim measures seeking such a suspension.

In the third place, the Court observes that Directive 89/665 [50] does not require that that suspension should remain in place after the end of the procedure before such a non-judicial review body, for example until a body that is judicial in character has ruled on the action that may be brought against the decision of that non-judicial review body.

That finding is consistent with the objectives pursued by Directive 89/665, which is intended to ensure full respect for the right to an effective remedy and to a fair hearing, enshrined in the first and second paragraphs of Article 47 of the Charter.

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46 Namely, Paragraphs 241, 242, 245, 246, 254, 257 and 264 of Zákon č. 134/2016 Sb., o zadávání veřejných zakázek (Law No 134/2016 on the award of public contracts), in the version applicable to the dispute in the main proceedings ('Law No 134/2016').

47 Article 2(3) and Article 2a(2) of Directive 89/665.

48 Article 2a(1) of Directive 89/665.

49 Article 2a(2) of Directive 89/665.

50 Article 2(3) of Directive 89/665, read in the light of Article 2(9) thereof.

In the fourth place, the Court finds that, under Directive 89/665, [51] a Member State may provide that where a contract has been entered into after the end of the standstill on its conclusion, the powers of the body responsible for review procedures are to be limited to awarding damages to any person harmed by an infringement of EU law on public procurement or of national rules implementing that law.

In that respect, the Court states that that interpretation cannot be called into question by the judgment in Randstad Italia. [52] In that judgment, the Court interpreted the expression 'independent review body', within the meaning of the second subparagraph of Article 2a(2) of Directive 89/665, as referring to an independent and impartial tribunal, but expressly limited that latter interpretation, stating that it applied '[for] determining whether the exclusion of a tenderer has become definitive'.

In the fifth and last place, the Court states that, where the legislation of a Member State does not provide for the automatic suspension of the conclusion of a public contract until the date on which the review body of first instance rules on the review, and where that review body is not judicial in character, the rejection by that body of an application for interim measures seeking to prohibit the conclusion of a public contract until the date on which that body rules on that application must be amenable to judicial review with suspensive effect until the court considering the matter has ruled on those interim measures.

That requirement derives from a reading of Directive 89/665. Accordingly, in order to ensure the effectiveness of an action against the decision of a non-judicial body of first instance rejecting an application for interim measures seeking to prohibit the conclusion of a public contract until the date on which that body has ruled, first, the tenderer concerned must be accorded a reasonable standstill period in order to enable it to bring that action and, second, if that action is brought, the conclusion of that contract must remain suspended until the court considering the matter rules on that action.

The Court therefore concludes that the Czech legislation, which prohibits a contracting authority from concluding a public contract only until the date on which the body of first instance rules on the review of the decision to award that contract, does not infringe Directive 89/665, it being irrelevant in that regard whether that review body is judicial in character or not.

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51 Article 2(7), second subparagraph, of Directive 89/665.

52 Judgment of 21 December 2021, Randstad Italia, C-497/20, EU:C:2021:1037.

IX. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 24 January 2024, Hypo Vorarlberg Bank v SRB, T-347/21

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 ex ante contributions – Obligation to state reasons – Right to be heard – Principle of legal certainty – Right to effective judicial protection – Plea of illegality – Limitation of the temporal effects of the judgment

Hearing an action for annulment, which it upholds, the General Court, after rejecting the pleas of illegality raised against Regulation No 806/2014, [1] Directive 2014/59, [53] and Delegated Regulation 2015/63, [54] provides significant clarification regarding, first, the scope of the obligation to state reasons incumbent on the Single Resolution Board (SRB) as regards the determination of the annual target level.

Hypo Vorarlberg Bank AG ('the applicant') is a credit institution established in Austria.

On 14 April 2021, the SRB adopted a decision in which it set [55] the 2021 ex ante contributions to the Single Resolution Fund ('the SRF') of credit institutions and certain investment firms, one of which was the applicant ('the contested decision'). [56]

Findings of the Court

With regard to the plea alleging failure to fulfil the obligation to state reasons as regards the setting of the annual target level. The Court recalls, first of all, that, in accordance with the applicable legislation, by the end of the initial period of eight years from 1 January 2016 ('the initial period'), the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all participating Member States. Next, during the initial period, ex ante contributions must be spread out in time as evenly as possible until the final target level is reached. Furthermore, each year, the contributions due by all of the institutions authorised in the territories of all of the participating Member States are not to exceed 12.5% of the final target level. In addition, as regards the methodology for calculating the ex ante contributions, the SRB is to determine the amount of those contributions on the basis of the annual target level by taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all the institutions authorised in the territories of the participating Member States. Lastly, the SRB is to calculate the ex ante contribution for each institution on the basis of the annual target level, which must be established with reference to the final target level, and in accordance with the methodology set out in Delegated Regulation 2015/63.

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53 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

54 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

55 In accordance with Article 70(2) of Regulation 806/2014.

56 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 ex ante contributions to the Single Resolution Fund.

In the present case, as is apparent from the contested decision, the SRB set the amount of the annual target level, for the 2021 contribution period, at EUR 11 287 677 212.56. In that decision, it explained, in essence, that the annual target level was to be determined on the basis of an analysis of the evolution of covered deposits in the previous years, any relevant developments in the economic situation and an analysis of the indicators relating to the phase of the business cycle and the effects that pro-cyclical contributions may have on the financial position of the institutions. The SRB considered it appropriate to set a coefficient based on that analysis and on the financial means available in the SRF ('the coefficient') and applied that coefficient to one eighth of the average amount of covered deposits in 2020, in order to obtain the annual target level. It subsequently set out the approach taken in order to determine the coefficient. In the light of those considerations, the SRB set the coefficient value at 1.35%. It then calculated the amount of the annual target level by multiplying the average amount of covered deposits in 2020 by that coefficient, and by dividing the result of that calculation by eight.

In that regard, although the SRB is required to provide the institutions, by means of the contested decision, with explanations concerning the methodology for determining the annual target level, such explanations must be consistent with the explanations provided by the SRB during the judicial proceedings and relating to the methodology actually applied. However, that is not the case in this instance.

At the hearing, the SRB stated that it had determined the annual target level for the 2021 contribution period using a methodology based on four stages, the last two of which consisted of deducting from the final target level the financial means available within the SRF, in order to calculate the amount that remained to be received until the end of the initial period, and by dividing that amount by three.

The Court observes that no reference is made to the last two stages of that calculation in the mathematical formula which is presented in the contested decision as the basis for determining the amount of the annual target level.

Furthermore, that finding cannot be called into question by the SRB's assertion that, in May 2021, it published the Fact Sheet, which contained a range indicating the potential amounts of the final target level, and, on its website, the amount of the financial means available in the SRF. Irrespective of whether the applicant was actually aware of those amounts, they were not, in themselves, such as to enable it to understand that the last two stages of the calculation had actually been applied by the SRB, and it should be noted, moreover, that the mathematical formula did not even mention them.

Similar inconsistencies also affect the manner in which the coefficient of 1.35% was set, which nonetheless plays a crucial role in that mathematical formula. It follows from the explanations provided by the SRB at the hearing that that coefficient was set in such a manner as to justify the result of the calculation of the amount of the annual target level, that is to say, after the SRB calculated that amount in accordance with the four stages of the methodology actually applied. That approach is not in any way apparent from the contested decision.

Moreover, the range within which, according to the Fact Sheet, the amount of the estimated final target level was set is inconsistent with the range of the growth rate of covered deposits, which is between 4% and 7% as set out in the contested decision. The SRB stated at the hearing that, for the purpose of determining the annual target level, it had taken into account the 4% growth rate of covered deposits – which was the lowest rate in the second range – and that it had thus obtained the estimated final target level of EUR 75 billion – which was the highest value in the first range. It is therefore apparent that there is a discrepancy between those two ranges. In those circumstances, the applicant was not in a position to ascertain the manner in which the SRB had used the range relating to the rate of growth of those deposits in order to arrive at the calculation of the estimated final target level.

The Court considers that, as regards the determination of the annual target level, the methodology actually applied by the SRB, as explained at the hearing, does not correspond to the one described in the contested decision, with the result that the actual reasons, in the light of which that target level was set, could not be identified on the basis of the contested decision either by the institutions or by the Court. The contested decision is therefore vitiated by defective reasoning as regards the determination of the annual target level.

In view of the heads of illegality which vitiate the contested decision, the Court annuls the contested decision in so far as it concerns the applicant.

Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision, in so far as it concerns the applicant, until the entry into force, within a reasonable period which cannot exceed six months from the date of delivery of the present judgment, of a new decision of the SRB determining the applicant's ex ante contribution to the SRF for the 2021 contribution period.

X. JUDGMENTS PREVIOUSLY DELIVERED

1. PROCEEDINGS OF THE EUROPEAN UNION: ACTION TO ESTABLISH NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

Judgment of the General Court (Fourth Chamber, Extended Composition), 20 December 2023, Banca Popolare di Bari v Commission, T-415/21

Non-contractual liability – State aid – Aid granted by the Italian authorities to Banca Tercas – Decision declaring the aid incompatible with the internal market – Limitation period – Continuous damage – Partial inadmissibility – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Causal link

In 2013, the Italian bank Banca Popolare di Bari SpA (BPB) expressed its interest in subscribing to a capital increase in another Italian bank, Banca Tercas ('Tercas'), which had been placed under special administration in 2012. That expression of interest was nevertheless conditional on the negative equity of Tercas being covered in full by the Interbank Deposit Protection Fund ('FITD').

In 2014, with the approval of the central bank of the Italian Republic, the FITD took action for the benefit of Tercas, covering its negative equity and granting it two guarantees. Subsequently, BPB subscribed to two increases in Tercas's capital.

By decision of 23 December 2015 [57] ('the Tercas decision'), the European Commission concluded that the abovementioned action taken by the FITD for the benefit of Tercas, which had been wholly owned by BPB since 1 October 2014, constituted State aid that was incompatible with the internal market, within the meaning of Article 107(1) TFEU, and that had to be recovered from its beneficiary by the Italian Republic.

Nevertheless, by judgment of the General Court of 19 March 2019, [58] upheld on appeal, [59] the Tercas decision was annulled on the ground of infringement of Article 107(1) TFEU.

By letter of 28 April 2021, BPB applied to the Commission for compensation for the damage it had allegedly suffered as a result of the Tercas decision, which it estimated at EUR 228 million. The

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57 Commission Decision (EU) 2016/1208 of 23 December 2015 on State aid granted by Italy to the bank Tercas (Case SA.39451 (2015/C) (ex 2015/NN)) (OJ 2016 L 203, p. 1).

58 Judgment of 19 March 2019, Italy and Others v Commission (T-98/16, T-196/16 and T-198/16, EU:T:2019:167).

59 Judgment of 2 March 2021, Commission v Italy and Others (C-425/19 P, EU:C:2021:154).

Commission rejected that application and BPB brought an action to establish non-contractual liability on the part of the European Union under the second paragraph of Article 340 TFEU.

In support of its action, BPB argued that the Tercas decision had caused a loss of confidence in it on the part of its customers, which had caused it to lose deposits and customers (loss of profit), had caused damage to its reputation (non-material damage) and had generated expenditure on measures to mitigate the adverse effects of that decision (actual damage).

In dismissing the action, the General Court set out the conditions governing the establishment of the European Union's non-contractual liability on account of the Commission's incorrect application of the State aid rules.

Findings of the Court

The Commission having pleaded the expiry of the five-year limitation period, provided for by Article 46 of the Statute of the Court of Justice of the European Union ('the Statute of the Court'), for bringing proceedings against the European Union in matters arising from non-contractual liability, [60] the General Court pointed out that that period did not begin to run until the time when the damage to be made good had materialised.

Pointing out that the application for compensation made to the Commission by letter of 28 April 2021 constituted an intervening act causing time to stop running for the purposes of the limitation period, the Court emphasised that, in the case of damage of a continuing nature, the time-bar applied to the period preceding by more than five years the date of the event which interrupted the limitation period and did not affect rights which had arisen during subsequent periods.

In that connection, the Court held that the alleged material damage resulting both from BPB's loss of direct deposits and from its loss of customers was continuous in nature, since it had accumulated and recurred since the adoption of the Tercas decision. The alleged non-material damage resulting from the damage to BPB's reputation was also continuous in nature, since the source of that damage was the Tercas decision, which had initially been adopted and made public by means of a press release and had subsequently been published in the Official Journal of the European Union.

It followed that BPB's action for compensation was not time-barred to the extent that it concerned the reparation of damage resulting from the loss of direct deposits and customers and from the damage to its reputation suffered after 28 April 2016, which is to say, during the period preceding by less than five years the application for compensation that was made on 28 April 2021.

As regards the alleged actual damage consisting in the additional expenditure incurred by BPB on measures to mitigate the adverse effects of the Tercas decision, the Court found that much of that alleged damage was not continuous, since it had actually materialised on a specific date and that the scale of the damage had not increased with the passage of time.

As to the substance, the Court began by pointing out that, in order for the European Union to incur non-contractual liability, three cumulative conditions must be satisfied: there must be a sufficiently serious breach of a rule of law intended to confer rights on individuals, actual damage must be established and there must be a direct causal link between the breach and the damage sustained.

As regards the first of those conditions, the Court pointed out, first, that the error which the Commission had made in its application of Article 107(1) TFEU in the Tercas decision constituted a breach of a rule of law intended to confer rights on individuals, such as BPB. Indeed, in that it provides a definition of the concept of State aid incompatible with the internal market, so as to ensure fair competition among the undertakings of the Member States, Article 107(1) TFEU is intended to protect the interests of individuals and, in particular, of undertakings. Moreover, the application of the concept of State aid contained in Article 107(1) TFEU is closely linked to the application of

60 By virtue of the first paragraph of Article 53 of the Statute of the Court, Article 46 thereof applies to proceedings before the General Court.

Article 108(3) TFEU, which establishes the obligation to notify aid measures as well as the prohibition on implementing them before the conclusion of the preliminary examination procedure by the Commission. Given that Article 108(3) TFEU has direct effect, it can be relied on by individuals in order to assert the rights flowing from its application. It is for the purposes of applying the concept of State aid, provided for in Article 107(1) TFEU, that Article 108 TFEU confers power on the Commission to determine whether State aid is compatible with the internal market. Furthermore, the application of Article 107(1) TFEU by the Commission could be contested before the Courts of the European Union by the recipients of the aid, by their competitors and by the Member States.

As to the existence of a sufficiently serious breach, the Court noted, secondly, that account had been taken in the case-law of the complexity of the situations to be regulated, the difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question. Where the institution concerned has a broad discretion, the decisive criterion for establishing such a breach is whether that institution has manifestly and gravely disregarded the limits on its discretion.

Having regard to those criteria, the Court pointed out that the Commission's infringement of Article 107(1) TFEU in the Tercas decision, although established in the judgments of the General Court and of the Court of Justice, was nevertheless not automatically a sufficiently serious breach. Recalling that the Commission's error lay in its analysis of the information on which it had relied in order to establish the involvement of the Italian public authorities in the FITD's intervention, the General Court also emphasised that the Commission had had to apply the concept of State aid within the meaning of Article 107(1) TFEU in a particularly complex legal and factual context. The fact that, under those circumstances, the Commission had not established to the requisite legal standard that the FITD's intervention could be imputed to the State is not sufficient for that error to be characterised as a manifest and grave disregard for the limits on its discretion. Consequently, the Commission had not committed a sufficiently serious breach in its infringement of Article 107(1) TFEU.

The Court then considered the condition relating to the existence of a direct causal link between the Commission's infringement of Article 107(1) TFEU and the damage alleged by BPB. In that connection, it found that, even if the Tercas decision had played a part in the progressive loss of confidence on the part of BPB's customers, that loss of confidence had also been caused by other factors, and so the decision could not be regarded as the decisive and direct cause of the alleged damage. Consequently, BPB had not proven that there was a causal link between the alleged unlawful conduct of the Commission and the alleged damage.

Accordingly, the Court concluded that, in so far as concerned the damage for which BPB sought compensation that was not time-barred, the conditions for establishing the non-contractual liability of the European Union relating to the existence of a sufficiently serious breach, on the one hand, and the existence of a causal link between the conduct complained of and the damage alleged, on the other, were not satisfied.

The Court therefore dismissed BPB's action, without finding it necessary to consider the condition for establishing the non-contractual liability of the European Union that actual damage has been suffered.

2. FREEDOM OF MOVEMENT: FREE MOVEMENT OF WORKERS

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Chief Appeals Officer and Others, C-488/21

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the European Union – Articles 21 and 45 TFEU – Right of Union citizens to move and reside freely in the territory of the Member States – Worker having acquired the nationality of the host Member State while retaining his or her nationality of origin – Directive 2004/38/EC – Article 3 – Beneficiaries – Article 2(2)(d) – Family member – Dependent direct relatives in the ascending line of a worker who is a Union citizen – Article 7(1)(a) and (d) – Right of residence for more than three months – Retention of the status of dependant in the host Member State – Article 14(2) – Retention of the right of residence – Regulation (EU) No 492/2011 – Article 7(2) – Equal treatment – Social advantages – Social assistance benefits – Unreasonable burden on the social assistance system of the host Member State

GV, a Romanian national, is the mother of AC, also a Romanian national, who resides and works in Ireland. Moreover, AC has been naturalised as an Irish national.

Since 2017, GV has resided in Ireland with her daughter, on whom she is financially dependent. In September 2017, as a result of the deterioration in her state of health linked to arthritis, GV applied for a disability allowance under a social protection law.

As is apparent from the order for reference, that allowance, which is meant to protect against poverty, is a social assistance payment financed by the general budget, without the person concerned having to make any social security contributions. In addition, entitlement to the allowance is subject to certain criteria, relating in particular to age, means and disability. Moreover, that disability allowance is a 'special non-contributory cash benefit' within the meaning of Regulation No 883/2004. [61] Last, it appears that Irish law precludes the payment of that allowance to a person who is not habitually resident in Ireland, such as a person who does not have a right to reside there.

In February 2018, GV's application for the disability allowance was refused, on the ground that she did not have a right of residence in Ireland.

Tasked with reviewing the refusal of that application, in July 2019, the Appeals Officer (Ireland) concluded that GV, as a dependent direct ascendant of a Union citizen working in Ireland, had a right to reside but was not entitled to receive social welfare assistance. Hearing an application for revision, the Chief Appeals Officer (Ireland) confirmed that reasoning given that, in accordance with the national legislation transposing Directive 2004/38, [62] if she were granted the allowance, GV would become an unreasonable burden on the national social assistance system and, therefore, she would no longer have a right to reside.

By a judgment delivered in July 2020, the High Court (Ireland) annulled the decision taken by the Chief Appeals Officer. That court considers, in particular, that the abovementioned national legislation, to the extent that it makes the right of residence of a family member of an Irish citizen subject to the

61 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigenda OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30).

62 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

condition that that family member must not become an unreasonable burden on the social assistance system of the State, is inconsistent with Directive 2004/38, governing the right of Union citizens and their family members to move and reside freely within the territory of the Member States.

Hearing an appeal against that judgment, the referring court decided to ask the Court of Justice, in essence, whether EU law precludes legislation of a Member State which permits the authorities of that Member State to refuse to grant a social assistance benefit to a direct relative in the ascending line who, at the time the application for that benefit is made, is dependent on a worker who is a Union citizen, or even to withdraw from him or her the right of residence for more than three months, on the ground that the grant of the said benefit would have the effect that that family member would no longer be dependent on the worker who is a Union citizen and would thus become an unreasonable burden on the social assistance system of the said Member State.

By its judgment, delivered by the Grand Chamber, the Court rules that the principle of freedom of movement for workers, [63] as implemented by Regulation No 492/2011 [64] on freedom of movement for workers within the Union, read in combination with Directive 2004/38, precludes such national legislation.

Findings of the Court

As a preliminary point, the Court recalls that Directive 2004/38, the interpretation of which was sought by the referring court, governs only the conditions of entry and residence of a Union citizen in Member States other than the one of which he or she is a national. Consequently, it is not intended to confer, in the territory of that Member State, a derived right of residence on family members of that citizen. In this case, since AC's naturalisation, that directive is no longer intended to govern either her right of residence in Ireland or the derived right of residence that her family members may enjoy.

That being so, the Court has held that the situation of a national of one Member State who has exercised his or her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to his or her nationality of origin. Thus, if the rights conferred on Union citizens by Article 21 TFEU and, more specifically, on workers by Article 45 TFEU, are to be effective, a family member of a Union citizen who is a worker who, after having exercised his or her freedom of movement by residing and working in the host Member State, has acquired the nationality of that Member State, must be able to be granted a derived right of residence. Furthermore, the conditions for granting the derived right of residence enjoyed by that family member must not be stricter than those provided for in Directive 2004/38 for the family member of a Union citizen who has exercised his or her right of freedom of movement by settling in a Member State other than that of which he or she is a national, since that directive must be applied by analogy to such a situation. Finally, a worker who is a Union citizen enjoys – including where, as in this case, he or she has acquired the nationality of the host Member State, in addition to his or her nationality of origin – the right to equal treatment under Article 45(2) TFEU, as implemented by Article 7(2) of Regulation No 492/2011. [65]

In that context, in the first place, the Court states that it follows from a combined reading of several provisions of Directive 2004/38 [66] that the direct relatives in the ascending line of a worker who is a

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63 That principle is laid down in Article 45 TFEU.

64 More specifically Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

65 Under that provision, a worker who is a national of a Member State is, in the territory of another Member State, to enjoy 'the same social and tax advantages as national workers'.

66 Those being Article 2(2)(d) and Article 7(1)(a) and (d) of Directive 2004/38.

Union citizen have a derived right of residence for more than three months where they are 'dependent' on that worker. In order for the family member concerned to be able to enjoy that right, that situation of dependence must exist, in the country from which that person comes, at the time when he or she applies to join the Union citizen on whom he or she is dependent. The person concerned will be able to retain the said right as long as he or she remains dependent on that worker, [67] until such time as that relative, having resided lawfully for a continuous period of five years in the host Member State, can claim a right of permanent residence. [68]

In the second place, as regards the abovementioned right to equal treatment enjoyed by a worker who is a Union citizen under Article 7(2) of Regulation No 492/2011, the Court recalls that the concept of 'social advantages' provided for in that provision includes all the advantages which, whether or not they are linked to a contract of employment, are granted to national workers generally, primarily because of their objective status as workers or by virtue of the mere fact of their residence in the national territory, and which it therefore appears appropriate to extend to workers who are nationals of other Member States in order to facilitate their mobility within the European Union. That concept may include social assistance benefits which, at the same time, come under the specific scope of Regulation No 883/2004, like the disability allowance. Moreover, a social assistance benefit, such as the disability allowance granted to a direct relative in the ascending line, constitutes for the migrant worker a 'social advantage' within the meaning of Article 7(2) of Regulation No 492/2011, since that direct relative in the ascending line is dependent on that worker, within the meaning of Article 2(2)(d) of Directive 2004/38. Furthermore, the said dependent direct relative in the ascending line, as an indirect beneficiary of the equal treatment accorded to the said worker, may rely on Article 7(2) of Regulation No 492/2011 in order to obtain that allowance where, under national law, it is granted directly to such relatives in the ascending line. Having regard to the protection against discrimination that the migrant worker and members of his or her family may suffer in the host Member State guaranteed by that provision, the status of 'dependent' relative in the ascending line within the meaning of Article 2(2)(d) of Directive 2004/38 cannot be affected by the grant of a social assistance benefit in the host Member State. To decide otherwise would, in practice, preclude that dependent family member from claiming that benefit and would thus undermine the equal treatment accorded to the migrant worker. It is important in that regard to emphasise that, through the taxes which a migrant worker pays in the host Member State in the course of his or her employment, that worker also contributes to the financing of the social policies of that Member State and should, consequently, profit from them under the same conditions as national workers. Therefore, the objective consisting in avoiding an unreasonable financial burden on the host Member State cannot justify the unequal treatment of migrant workers as compared with national workers.

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67 In accordance with Article 14(2), read in combination with Article 2(2)(d) and Article 7(1)(a) and (d), of Directive 2004/38.

68 That right of permanent residence is governed by Article 16(1) of Directive 2004/38.

3. JUDICIAL COOPERATION IN CRIMINAL MATTERS: EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Judgment of the Court (Grand Chamber), 21 December 2023, G. K. and Others (European Public Prosecutor's Office), C-281/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – European Public Prosecutor's Office – Regulation (EU) 2017/1939 – Article 31 – Cross-border investigations – Judicial authorisation – Scope of the review – Article 32 – Enforcement of assigned measures

The European Public Prosecutor's Office (EPPO), through a European Delegated Prosecutor in Germany, is conducting preliminary investigations into G.K., S.L. and B.O.D. GmbH. They are suspected of making false customs declarations and thus of causing damage of approximately EUR 1 295 000 to the financial interests of the European Union.

In the context of the investigation taking place in Germany, the EPPO considered it necessary to gather evidence in other Member States, including Austria. To that end, the German handling European Delegated Prosecutor assigned [69] the search and seizure of property of the accused persons in Austria to an Austrian assisting European Delegated Prosecutor. On 9 November 2021, the latter prosecutor ordered searches and seizures, both at the business premises of B O.D. and its parent company and at the homes of G. K. and S.L., all located in Austria. That prosecutor also requested the competent Austrian courts to authorise those measures. [70] Those authorisations having been obtained, the measures ordered were enforced.

On 1 December 2021, G.K., B.O.D. and S.L. brought actions before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), the referring court, against the decisions of the Austrian courts which authorised the measures at issue. In particular, they challenged the justification for the investigation measures ordered against them.

The referring court asks whether, where an assigned investigation measure requires judicial authorisation to be obtained in the Member State of the assisting European Delegated Public Prosecutor, that measure must be examined by a court of that Member State in the light of all the procedural and substantive rules laid down by that Member State.

In its judgment, the Court of Justice, sitting as the Grand Chamber, provides clarification on the scope of the review that may be carried out by courts hearing a request from an assisting European Delegated Prosecutor to authorise an assigned investigation measure.

Findings of the Court

First of all, the Court observes that, although the first subparagraph of Article 31(3) of Regulation 2017/1939 provides that judicial authorisation is to be obtained in accordance with the law of the Member State of the assisting European Delegated Prosecutor where an assigned investigation measure requires such authorisation under the law of that Member State, Articles 31 and 32 of that regulation do not specify the extent of the review to be carried out by the competent court.

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69 Pursuant to Article 31 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ 2017 L 283, p. 1).

70 The first subparagraph of Article 31(3) of Regulation 2017/1939 provides that, if judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor is to obtain that authorisation in accordance with the law of that Member State.

Nevertheless, it is apparent from the wording of those two articles [71] that the adoption of an assigned investigation measure, as well as its justification, are to be governed by the law of the Member State of the handling European Delegated Prosecutor, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor. The distinction thus drawn by those articles between the justification and adoption of an assigned investigation measure, on the one hand, and its enforcement, on the other, reflects the logic underlying the system of judicial cooperation in criminal matters between the Member States, which is based on the principles of mutual trust and mutual recognition. In the context of judicial cooperation based on those principles, the executing authority is not supposed to review compliance by the issuing authority with the conditions for issuing the judicial decision which it must execute.

The Court then observes that, by setting up an EPPO, the objective of Regulation 2017/1939 is to combat more effectively offences affecting the financial interests of the European Union. [72] It follows that, by defining the procedures laid down by that regulation, the EU legislature intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition. However, although the grant of the judicial authorisation referred to in the first subparagraph of Article 31(3) of that regulation could be made subject to an examination, by the competent authority of the Member State of the assisting European Delegated Prosecutor, of the elements relating to the justification and adoption of the assigned investigation measure concerned, that would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation. First, the competent authority of the Member State of the assisting European Delegated Prosecutor would, in particular, have to examine in detail the entire case file, which would have to be forwarded to it and, where relevant, translated. Second, in order to carry out its examination, it would have to apply the law of the Member State of the handling European Delegated Prosecutor, although it cannot be considered to be the best placed to do so.

The Court concludes that Regulation 2017/1939 establishes, for the purposes of cooperation between European Delegated Prosecutors in the context of EPPO cross-border investigations, a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the enforcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor. In accordance with that sharing of responsibilities, any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure.

As regards matters relating to the justification and adoption of the assigned measure, the Court nevertheless points out that they must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union. In accordance with Article 31(2) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide for a prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure, taking into account the requirements stemming from the Charter of Fundamental Rights. Where the measures concerned are investigation measures such as searches of private homes, conservatory measures relating to personal property or asset freezing, it is then for that Member State to provide, in national law, for adequate and sufficient

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71 More specifically, from the wording of Article 31(1) and (2) and Article 32 of Regulation 2017/1939.

72 See recitals 12, 14, 20 and 60 of Regulation 2017/1939.

safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures.

Order of the General Court (Tenth Chamber), 15 December 2023, Stan v European Public Prosecutor's Office, T-103/23

Link to the full text of the order

Action for annulment – Article 42(1) and (2) of Regulation (EU) 2017/1939 – Decision of the Permanent Chamber of the European Public Prosecutor's Office to bring the case to judgment – Procedural act of the European Public Prosecutor's Office – Lack of jurisdiction

Following the reports made by two individuals to the Direcția Națională Anticorupție – Serviciul Teritorial Timişoara (National Anticorruption Directorate, Timişoara Territorial Section, Romania), a European Delegated Prosecutor in Romania ('the Prosecutor') opened an investigation in January 2022 on the ground that several persons had, since 2018, committed offences enabling them unlawfully to obtain funds from the budget of the European Union and the budget of the Romanian State.

In the course of that investigation and following an order from the Prosecutor, Mr Victor-Constantin Stan acquired the status of defendant in respect of acts, committed as a co-perpetrator, of unlawfully obtaining Romanian funds, punishable under the Romanian Criminal Code. According to the Prosecutor, Mr Stan had, for several years, submitted to the Romanian authorities false, inaccurate and incomplete documents concerning projects submitted by six companies with a view to obtaining funds from the Romanian national budget.

In December 2022, the European Public Prosecutor's Office ('EPPO') decided to bring the case concerning, inter alia, Mr Stan to judgment and dismissed the part of the case relating to acts of corruption and forgery not concerning him ('the contested decision'). [73]

Mr Stan initiated proceedings before the General Court seeking, inter alia, annulment of the contested decision and requested that the Court declare that it has jurisdiction. To that effect, he, inter alia, claimed that Regulation 2017/1939 on the establishment of the EPPO, [74] which provides for, a priori, the exclusive jurisdiction of national courts for the review of the validity of the EPPO's procedural acts, does not meet the requirements of the right to an effective remedy and to a fair hearing, as laid down by Article 47 of the Charter of Fundamental Rights of the European Union.

In its defence, the EPPO raised pleas of inadmissibility, on the ground that, inter alia, the Court does not have competence to rule on the claim for annulment directed against the contested decision, since Article 263 TFEU which relates to direct actions does not apply, in this instance, to procedural acts of the EPPO.

Hearing the action and the plea of inadmissibility, the Court rules on the novel question of the division of jurisdiction between the EU judicature and the national courts so far as concerns the judicial review of procedural acts of the EPPO and dismisses the action on account of its lack of jurisdiction to hear it.

Findings of the Court

First of all, the Court notes that the judicial review of procedural acts of the EPPO is provided for in Article 42 of Regulation 2017/1939. That article lays down that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties are subject to review by the competent

73 Decision of Permanent Chamber No 4 of the EPPO of 9 December 2022.

74 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (OJ 2017 L 283, p.1).

national courts in accordance with the requirements and procedures laid down by national law. [75] Moreover, it states that, in accordance with Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings, [76] first, concerning the validity of procedural acts of the EPPO, in so far as such a question of validity is raised before any court or tribunal of a Member State directly on the basis of EU law, secondly, concerning the interpretation or validity of provisions of EU law, including the regulation on the establishment of the EPPO, and, thirdly, concerning the interpretation of Articles 22 and 25 of that regulation in relation to any conflict of competence between the EPPO and the competent national authorities.

Furthermore, Article 42 expressly restricts the EU judicature's jurisdiction to review legality, under Article 263 TFEU, to certain types of decisions of the EPPO, [77] such as those aimed at dismissing a case without taking further action, provided that they are contested directly on the basis of EU law, those that affect the protection of data of the persons concerned as well as those of the EPPO which are not procedural acts, such as decisions concerning the right of public access to documents, decisions dismissing European Delegated Prosecutors or any other administrative decisions.

Next, as regards the possibility of basing the jurisdiction of the General Court on a broad interpretation of Article 42 of Regulation 2017/1939, or one that is in conformity with EU law, the Court recalls the settled case-law according to which recourse to a broad interpretation is possible only in so far as it is compatible with the wording of the provision at issue and that even the principle of interpretation in conformity with a rule of superior binding force cannot serve as the basis for an interpretation that is contra legem.

In this instance, the Court states that, for the judicial review of procedural acts adopted by the EPPO, the wording of Article 42(1) and (2) of Regulation 2017/1939 is in no way ambiguous inasmuch as those provisions confer on national courts exclusive jurisdiction to hear and determine procedural acts of the EPPO which are intended to produce legal effects vis-à-vis third parties, apart from the exceptions laid down in paragraphs 3 and 8 of that article. Therefore, it is only by way of preliminary ruling that the Court of Justice is called upon to rule on (i) the validity of those acts in the light of provisions of EU law and (ii) the interpretation or validity of provisions of the regulation at issue.

In the light of the foregoing, the General Court finds that, by requesting it to annul the contested decision and, consequently, to declare that it has jurisdiction, on the basis of an interpretation of the regulation on the establishment of the EPPO in the light of the right to an effective remedy, the applicant is proposing an interpretation contra legem, which cannot be accepted.

Even if the applicant does not confine himself to requesting a broad interpretation of Regulation 2017/1939 in order to claim that the Court has jurisdiction in the present case and that he intends to challenge the contested decision by contesting, by way of the plea of illegality, the validity of the regulation at issue in the light of Article 19 TEU, such a challenge cannot be accepted, on account of the Court's lack of jurisdiction to hear and determine the main action.

In that regard, the Court observes that, in the context of the judicial review provided for by Regulation 2017/1939, the Court of Justice has jurisdiction, inter alia, under Article 267 TFEU to rule on questions of interpretation and validity of (i) procedural acts of the EPPO and (ii) provisions of EU law, including that regulation. [78]

In the present case, the applicant may, in principle, challenge before the competent national courts the procedural acts of the EPPO referred to in Article 42(1) of Regulation 2017/1939 and, in that

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75 See Article 42(1) of Regulation 2017/1939.

76 See Article 42(2) of Regulation 2017/1939.

77 See Article 42(3) and (8) of Regulation 2017/1939.

78 Confirmation of which is provided by Article 42(2) of Regulation 2017/1939.

context, plead its illegality. In that situation, it will be for the Court of Justice, if the national court makes a reference to it, to rule on the validity of Article 42 of that regulation and, where appropriate, on the validity of the internal rules of procedure in the light of Regulation 2017/1939 and the other provisions of EU law relied on by the applicant in his application.

4. TRANSPORT

4.1. INTERNATIONAL ROAD HAULAGE

Judgment of the Court of Justice (Second Chamber), 21 December 2023, Commission v Denmark (Maximum parking time), C-167/22

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – International road haulage – Regulation (EC) No 1072/2009 – Articles 8 and 9 – Regulation (EC) No 561/2006 – Rest periods – National legislation introducing a maximum parking time at public rest areas of 25 hours along the motorway network of a Member State – Restriction on the freedom to provide road transport services – Burden of proof

Regulation No 1072/2009 on common rules for access to the international road haulage market [79] aims to establish a common transport policy leading to the removal of all restrictions against the person providing transport services on the grounds of nationality or the fact that he or she is established in a different Member State from the one in which the services are to be provided.

On 1 July 2018, the Kingdom of Denmark laid down a rule limiting the maximum parking time at public rest areas along its motorway network to 25 hours ('the 25-hour rule'). [80]

After sending the Kingdom of Denmark a request for information, the European Commission initiated infringement proceedings on the basis of Article 258 TFEU for failure to fulfil the obligation to ensure the freedom to provide transport services as laid down in Regulation No 1072/2009. It argued, in essence, that, although the 25-hour rule does not introduce direct discrimination, it constitutes a restriction on the freedom to provide transport services since it does not affect road hauliers established in Denmark in the same way as non-resident road hauliers. The Kingdom of Denmark denied any infringement in that regard and provided the additional information requested by the Commission. Taking the view that that reply was unconvincing, the Commission sent a reasoned opinion to that Member State, to which the latter responded, maintaining its position concerning the compliance of the 25-hour rule with EU law. Still unconvinced by the arguments put forward by the Danish Government, the Commission brought an action for failure to fulfil obligations before the Court of Justice, seeking a declaration that, by laying down the 25-hour rule, the Kingdom of Denmark had failed to fulfil its obligations relating to the freedom to provide transport services laid down in Articles 1, 8 and 9 of Regulation No 1072/2009. According to the Commission, that rule affects non-resident hauliers more and the resulting obstacle to the freedom to provide services is not justified by any of the overriding reasons of public interest relied on by that Member State.

By its judgment, the Court dismisses the Commission's action. It points out, in the light of its settled case-law, that, in an action for failure to fulfil obligations, the burden of proof relating to establishing

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79 Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

80 That rule was implemented by the road authority pursuant to Paragraph 92(1) of the færdselsloven (Danish Highway Code).

the existence of such a failure is borne by the Commission, and it may not rely on any presumption. The Court considers that, in the present case, the Commission has not adduced, to the requisite legal standard, proof of its allegations.

Findings of the Court

After rejecting the plea of inadmissibility raised by the Kingdom of Denmark, the Court examines the substance of the case and points out, first of all, that the services which are classified as 'service[s] in the field of transport' fall within the scope of Article 58(1) TFEU, a specific provision which excludes them from the scope of Article 56 TFEU relating to the freedom to provide services in general. [81] That does not prevent an EU act adopted on the basis of those provisions of the Treaties relating to transport [82] from being able, to the extent that it determines, to make the principle of freedom to provide services as enshrined in Article 56 TFEU applicable to a transport sector.

In the present case, the Court notes that Regulation No 1072/2009 is to apply to the international carriage of goods by road for hire or reward for journeys carried out within the territory of the European Union and to the national carriage of goods by road for hire or reward undertaken on a temporary basis by a non-resident haulier. [83] In that regard, Article 9(2) of Regulation No 1072/2009 states, inter alia, that the national provisions referred to in paragraph 1 of that article are to be applied in the same way to non-resident hauliers as to those established in the host Member State, so as to prevent any discrimination on grounds of nationality or of place of establishment.

Next, as regards the Kingdom of Denmark's argument that competence to lay down rules on the duration of parking at public rest areas lies with the Member States, the Court recalls that, according to settled case-law, the Member States must exercise their powers in compliance with EU law, and therefore, in the present case, with the relevant provisions of Regulation No 1072/2009. In that context, they must also take account of the rules on driving times, breaks and rest periods which, under Regulation No 561/2006, [84] must be observed by drivers engaged in the carriage of goods with vehicles with a maximum permissible mass exceeding 3.5 tonnes [85] ('the vehicles concerned'). Compliance with those rest periods may depend, inter alia, on the availability of rest areas on motorways. In that regard, the Court finds that, by its very nature, a rule such as that of 25 hours has the effect of making those rest areas unavailable in order to comply with the various rest periods provided for in Regulation No 561/2006. [86] It follows that such a rule is, a priori, capable of having a specific effect on the exercise, by non-resident hauliers, of transport rights, in particular cabotage, and of affecting them more than hauliers established in Denmark.

In that regard, the Court points out, however, that, according to settled case-law, in proceedings for failure to fulfil obligations it is for the Commission to establish the existence of the alleged infringement and to provide the Court with the information necessary for it to assess whether the infringement exists, and that the Commission may not rely on any presumption. In the present case, the Kingdom of Denmark produced, in the pre-litigation procedure and in its defence, data on the number of parking spaces available for the vehicles concerned, in particular those provided by the

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81 Judgments of 20 December 2017, Asociación Profesional Elite Taxi (C-434/15, EU:C:2017:981, paragraph 44), and of 8 December 2020, Poland v Parliament and Council (C-626/18, EU:C:2020:1000, paragraph 145).

82 Namely, Title VI of Part Three of the FEU Treaty, which comprises Articles 90 to 100 TFEU.

83 In accordance with Article 1(1) and (4) of Regulation No 1072/2009, read in conjunction with Article 2(6) of that regulation.

84 Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1).

85 Those rules are expressly referred to in recital 13 and Article 9(1)(d) of Regulation No 1072/2009.

86 Regular weekly rest periods (of at least 45 hours) and reduced weekly rest periods (less than 45 hours, which may be reduced, in compliance with the conditions laid down in Article 8(6) of Regulation No 561/2006, to a minimum of 24 consecutive hours), with the sole exception of reduced weekly rest periods of between 24 and 25 hours.

private sector, and provided clarification on those data at the hearing. However, in its application, the Commission merely relied on a lack of adequate alternative parking capacity spread over the Danish motorway network and, moreover, in its reply, merely observed that the data produced in defence by the Kingdom of Denmark did not alter its conclusions in that regard.

By contrast, the Commission has not produced any objective data establishing the inadequacy of alternative parking capacities for the purposes of compliance with rest periods exceeding 25 hours. Without such data, it cannot be established, except on the basis of presumptions, that the 25-hour rule is in fact such as to impede cabotage activities carried out by non-resident service providers to the detriment of those established in Denmark. Thus, the mere existence of capacity problems on the public rest areas of the Danish motorway network and the identification by the Member State concerned of the challenges to be addressed in terms of parking capacity, which was one of the main reasons for the introduction of the 25-hour rule, do not support the conclusion that it infringes Regulation No 1072/2009. The same is true of the fact that the parking capacities provided by the private sector are lower than those of public rest areas, since, within that 25-hour limit, the parking of those vehicles remains permitted at such places.

Nor, lastly, has the Commission, in the present case, objectively established that the location of the alternative places provided by the private sector and their distribution across the territory or the fact that some of those places are subject to a fee would be such as to impede transport activities to the detriment of non-resident service providers, but merely relied in that regard on presumptions.

Accordingly, the Court considers that the Commission has not adduced, to the requisite legal standard, proof of its assertions that the 25-hour rule constitutes an obstacle to the freedom to provide transport services falling within the scope of Regulation No 1072/2009. Consequently, it dismisses the Commission's action for failure to fulfil obligations.

4.2. PUBLIC PASSENGER TRANSPORT SERVICES

Judgment of the Court of Justice (Fifth Chamber), 21 December 2023, DOBELES AUTOBUSU PARKS and Others, C-421/22

Reference for a preliminary ruling – Transport – Public passenger transport services by rail and by road – Regulation (EC) No 1370/2007 – Article 1(1) – Article 2a(2) – Article 3(1) – Article 4(1) – Article 6(1) – Contract for public passenger transport services by bus – Procedure for the award of a public services contract – Open, transparent and non-discriminatory tendering procedure – Specifications – Amount of compensation granted by the competent national authority – Indexation limited in time and categories of specific costs – Allocation of risks

An open tendering procedure was launched in Latvia with a view to awarding the right to provide public passenger transport services by bus on the network of lines of regional interest for a period of 10 years.

'Dobeles Autobusu parks SIA' and several other Latvian companies active in the transport sector brought an action before the Iepirkumu uzraudzības biroja Iesniegumu izskatīšanas komisija (Complaints Review Board of the Public Procurement Supervision Office, Latvia) challenging the provisions set out in the tender specifications. According to the applicants, those specifications and the corresponding draft contract established an unlawful compensation mechanism for the service at issue, which did not provide for a full procedure for revising the price of that service in the event of variations in costs having an effect on that price. As the Board dismissed their action, those

companies brought an action before the Administratīvā rajona tiesa (District Administrative Court, Latvia). That court also dismissed their action, on the ground, in essence, that the State is not required to cover all the costs of the operators of a public transport service during the procedure for revising the fare chargeable under the contract for the service and that the indexation procedure provided for in the draft public procurement contract is not contrary to the requirements imposed by Regulation No 1370/2007 on public passenger transport services by rail and by road. [87]

Hearing an appeal on a point of law, the Augstākā tiesa (Senāts) (Supreme Court (Senate), Latvia), the referring court in the present case, decided to refer a question to the Court of Justice for a preliminary ruling in order to determine whether Regulation No 1370/2007 authorises a compensation scheme that does not provide for the periodic indexation of the fare chargeable under the contract having regard to increases in costs inherent in the provision of the service that are beyond the control of the tenderer.

By its judgment, the Court examines whether Member States may, in the context of public service contracts concluded following an open, transparent and non-discriminatory tendering procedure, establish a compensation mechanism that leads to the transfer of risks linked to changes in costs to a provider of passenger transport services, thereby bringing about a risk of undercompensation as a result of the increase in some of those costs. In that regard, the Court considers that Regulation No 1370/2007 does not preclude such a compensation scheme, which does not require the competent national authorities to grant the provider of that public service, subject to public service obligations, full compensation covering, by means of periodic indexation, any increase in the costs associated with the management and the operation of that service which are outside of its control.

Findings of the Court

In the first place, the Court notes that, under Article 4(1) of Regulation No 1370/2007, public service contracts must, first, establish in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment, if any, is to be calculated, [88] and, second, determine the arrangements for the allocation of costs connected with the provision of services. [89]

It is clear that the competent national authorities, in so far as they are responsible for setting the parameters for calculating the compensation due to a provider of a public transport service and for defining the arrangements for allocating the costs connected with the provision of that service, enjoy, in the context of a public service contract, a margin of discretion in devising the mechanism for such compensation. In particular, the Court states that the possibility of allocating the costs necessarily implies that those authorities are not required to compensate all the costs, but may transfer to the provider of that public service the risks associated with changes to some of those costs, irrespective of whether or not that provider can fully control such changes, since those fall within circumstances outside of that provider's control.

It therefore follows from the wording of Article 4(1) of Regulation No 1370/2007 that the competent national authorities may, in the exercise of their margin of discretion, provide for a system of compensation which, by reason of the parameters for calculating such compensation and the arrangements for allocating the costs defined by those authorities, does not automatically guarantee the provider of the public transport service full coverage of those costs.

In the second place, after recalling that the purpose of Regulation No 1370/2007 is to define the conditions for the granting of compensation in order to guarantee a public passenger transport

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87 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, as amended by Regulation (EU) No 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22) ('Regulation No 1370/2007').

88 The first subparagraph of Article 4(1)(b)(i) of Regulation No 1370/2007.

89 Article 4(1)(c) of Regulation No 1370/2007.

service that is both efficient and financially profitable, [90] the Court infers from this that any compensation scheme must seek not only to avoid overcompensation of costs, but also to promote greater efficiency on the part of the provider of a public transport service. A compensation scheme that guarantees, in all circumstances, the automatic coverage of all costs associated with the performance of a public service contract does not contain such an incentive for greater efficiency, since the provider in question is not required to limit its costs.

In contrast, a compensation scheme which, in the absence of periodic indexation, does not automatically cover all of those costs, but results in the transfer of certain risks to the public service provider, may contribute to the attainment of such an objective. Even with regard to costs that are beyond the control of the service provider concerned, the efficiency gains that it has acquired will enable it to strengthen its financial viability in order to meet those costs, which will help to ensure the proper performance of the obligations laid down by the public service contract.

In the third place, the Court states that, where a public service contract is awarded following a competitive tendering procedure, such a procedure has, in itself, the effect of minimising the amount of compensation due to the public transport service provider, thereby avoiding, by an automatic adjustment, not only excessive compensation but also insufficient compensation.

Any service provider that decides to take part in a tendering procedure with a view to performing a public service contract itself determines the terms of its tender in the light of all the relevant parameters and, in particular, the probable trend in costs that are likely to affect the provision of the service, thereby defining the level of risk that it is prepared to assume. It may therefore be presumed that if it is awarded the contract, the tender will provide it with a rate of remuneration for the capital employed that corresponds to the level of risk incurred. It follows that a compensation scheme linked to a public service contract awarded following an open, transparent and non-discriminatory tendering procedure, in itself, guarantees the provider of that public service coverage for its costs, also guaranteeing it appropriate compensation, the amount of which will vary according to the level of risk that the provider is prepared to assume.

Accordingly, the competent national authorities are therefore not required, in the context of a competitive tendering procedure, to automatically compensate, by means of periodic indexation, all of the costs borne by the provider of a transport service in connection with the performance of a public service contract, regardless of whether or not they are under its control, with the effect that that contract provides that provider of a transport service with appropriate compensation.

Moreover, the absence of a mechanism for periodic indexation of costs cannot, on its own, be regarded as constituting an infringement of the principle of proportionality. A provider of transport services that participates in a tendering procedure itself determines the terms of its tender and the level of risk that it is prepared to assume with regard to the compensation arrangements set out in the public service contract, and in particular, the absence of such a mechanism. Therefore, if a competent national authority had to consider, in the context of a competitive tendering procedure, conditions that are unreasonable or are excessive in view of the risks to be assumed by the public service provider concerned, it would be unlikely that tenders would be submitted to it and the authority would have to amend those conditions in order to make them compatible with the principle of proportionality.

As regards the possibility that a provider of passenger transport services, in the hope of winning the contract, offers a fare chargeable under the contract that does not take sufficient account of a future increase in costs and which renders that provider of passenger transport services unable to perform the contract in an appropriate manner, that is inherent in every tender procedure. Therefore, that possibility does not justify that public service contracts concluded following an open tendering procedure always include a periodic indexation mechanism guaranteeing, automatically, full

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90 Article 1(1), Article 2a(2) and point 7 of the annex to Regulation No 1370/2007, read in the light of recitals 4, 7, 27 and 34 thereof.

compensation for any increase in the costs connected with their performance, regardless of whether or not those costs are under the control of the service provider.

5. COMPETITION

5.1. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES (ARTICLE 101 TFEU)

Judgment of the General Court (Tenth Chamber, Extended Composition), 20 December 2023, JPMorgan Chase and Others v Commission, T-106/17

Competition – Agreements, decisions and concerted practices – Euro Interest Rate Derivatives sector – Decision establishing an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Manipulation of the Euribor Interbank Benchmark Rates – Exchange of confidential information – Restriction of competition by object – Single and continuous infringement – 'Hybrid' procedure staggered over time – Presumption of innocence – Impartiality – Fines – Basic amount – Value of sales – Article 23(2) and (3) of Regulation (EC) No 1/2003 – Obligation to state reasons – Amending decision supplementing the statement of reasons – Equal treatment – Proportionality – Unlimited jurisdiction

In 2011, the Barclays banking group applied to the European Commission for leniency, informing it of the existence of a cartel in the Euro Interest Rate Derivatives (EIRD) sector.

Those EIRDs are linked to the Euro Interbank Offered Rate (Euribor), a set of benchmark interest rates intended to reflect the cost of euro-denominated interbank loans, or to the Euro Over-Night Index Average (EONIA), which fulfilled a function equivalent to that of Euribor, but with regard to daily rates. The Euribor rate is based on the individual quotes notified by the banks belonging to a panel made up of 47 financial institutions ('the Euribor panel').

Following the initiation of infringement proceedings by the Commission, the financial institutions Barclays, Deutsche Bank, Royal Bank of Scotland and Société générale decided to participate in a settlement procedure pursuant to Article 10a of Regulation (EC) No 773/2004. [91] At the end of that procedure, the Commission adopted, on 4 December 2013, a decision [92] finding that those institutions had participated in a single and continuous infringement with the object of distorting the normal course of pricing on the EIRD market.

Since the financial institutions JPMorgan Chase & Co., JPMorgan Chase Bank, National Association and J. P. Morgan Services LLP (together, 'JP Morgan'), Crédit agricole and HSBC had not submitted a proposal for settlement, the Commission continued its investigation against them.

By decision of 7 December 2016, [93] the Commission found that JP Morgan had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 27 September 2006 to 19 March 2007, in a single and continuous infringement with the object of distorting the normal course of pricing components on the EIRD market and imposed on it a fine of EUR 337 196 000.

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91 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18), as amended.

92 Commission Decision C(2013) 8512 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD) (Settlement)) ('the settlement decision').

93 Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD)) ('the contested decision').

According to the Commission, JP Morgan's infringing conduct consisted of discussions between one of its traders and the traders of two other financial institutions belonging to the Euribor panel concerning, in essence, the manipulation of their banks' submissions to that Euribor panel for the purpose of the calculation of Euribor, trading positions as regards EIRDs and their pricing intentions and strategies concerning EIRDs.

Before the General Court, JP Morgan seeks, first, the annulment in part of that decision, and, second, in the alternative, the annulment of the fine imposed or a reduction of the amount of that fine.

After the action was brought, the Commission adopted an amending decision [94] to supplement the statement of reasons provided in the light of the judgment in HSBC Holdings and Others v Commission, handed down by the Court in a related case. [95]

By its judgment, the Tenth Chamber (Extended Composition) of the General Court clarifies the criteria for establishing whether an undertaking participated in anticompetitive practices, in particular through the exchange of information, in the financial products sector. However the Court annuls the contested decision in so far as it imposes a fine on JP Morgan on the ground of an inadequate statement of reasons. It then exercises its unlimited jurisdiction and imposes on JP Morgan a fine in the same amount as that imposed in the contested decision.

Findings of the Court

After confirming the accuracy of the findings as regards the exchanges between the JP Morgan trader, the Deutsche Bank trader and the Barclays trader examined in the contested decision, with the exception of one of those exchanges, the Court rejects JP Morgan's arguments that they did not have the object of manipulating Euribor or EONIA. In that context, the Court states, in particular, that JP Morgan's alleged conduct does not consist of the manipulation of Euribor as such, but of participation in a network of bilateral contacts the object of which was to distort the normal course of pricing components in the sector of EIRDs linked to Euribor and/or EONIA.

As regards the Commission's finding of a single infringement, the Court states that three factors are decisive for concluding that an undertaking participated in such an infringement:

(i) the various forms of conduct in question must form part of an 'overall plan' with a single objective;

(ii) the undertaking must have been aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or have reasonably been able to foresee all that conduct and have been prepared to take the risk; and

(iii) the undertaking must have intended, through its own conduct, to contribute to the common objectives pursued by all the participants.

As regards the first factor, the Court states that the Commission defined the single objective, in a sufficiently precise manner, as seeking to influence the cash flow payable under EIRD contracts to the detriment of the counterparties to those contracts. All of the exchanges relied on against JP Morgan had the same single objective.

Moreover, that conclusion is supported by other evidence relied on by the Commission in the contested decision. Indeed, the practices at issue concerned the same products, namely EIRDs and took the form of relatively regular bilateral exchanges overlapping in time and taking place between a stable group of individuals employed by the banks concerned.

As regards the second factor, JP Morgan specifically disputed only its awareness of the conduct put into effect by the other parties to the cartel seeking to manipulate Euribor fixings. In that regard, the

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94 Commission Decision C(2021) 4610 final of 28 June 2021 amending the contested decision.

95 Judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675). That judgment was annulled in part by the judgment of the Court of Justice of 12 January 2023, HSBC Holdings and Others v Commission (C-883/19 P, EU:C:2023:11).

Court finds, however, that the evidence, viewed as a whole as a body of evidence, shows that the JP Morgan trader could reasonably have foreseen that the exchanges at issue in which he participated formed part of a single infringement involving other banks aimed at altering the cash flows payable under EIRDs through concerted actions to manipulate the Euribor rate, and that he was prepared to take the risk.

As regards the third factor, the Court states that the JP Morgan trader participated, jointly with traders from other banks, in the collusive practices and thus intended to contribute through his own conduct to the common aim pursued by all the participants.

Having thus confirmed the finding of the alleged infringement and its categorisation as a single and continuous infringement, and having rejected the claim for annulment in so far as that finding of the contested decision was concerned, the Court, by contrast, upholds the claim for annulment of the contested decision in so far as it imposes a fine on JP Morgan, on the ground that the Commission breached its obligation to state reasons as regards the determination of the amount of the fine.

Although the Commission did not make an error of assessment by using, for the purpose of determining the amount of the fine imposed on JP Morgan, discounted cash receipts as the proxy for the value of sales, it did not sufficiently explain why the discount factor applied to those receipts was set at 98.849%. Furthermore, since the Commission did not demonstrate that it was practically impossible to state to the requisite legal standard the reasons for the contested decision in that respect, the supplement to the statement of reasons provided in that regard in the amending decision cannot be accepted either, since it did not amend the operative part of the contested decision.

Lastly, exercising its unlimited jurisdiction, the Court examines JP Morgan's claim for a reduction of the amount of the fine that was imposed on it.

Noting that the fixing of a fine in the exercise of its unlimited jurisdiction is not an arithmetically precise exercise, the Court uses, as the Commission did in its approach, the value of discounted cash receipts as the initial data for determining the basic amount of the fine, since that value reflects the economic significance of the infringement and the relative strength of the undertaking in the infringement. As regards determining the reduction factor, the application of which is necessary in order to prevent the imposition of a fine that is over-deterrent, the Court notes that the parties agree that that factor should be set at 98.849% at the very least.

With regard to the gravity of the infringement, the Court states that, since the conduct at issue relates to factors that are relevant to the determination of the prices of EIRDs, they are, by their very nature, among the most serious of restrictions to competition. In addition, the practices at issue are particularly serious and harmful since they are liable not only to distort competition on the EIRD market, but also, more broadly, to compromise the trust placed in the banking system and the financial markets as a whole and their credibility.

With regard to mitigating circumstances, the Court finds that JP Morgan played a less important role in the infringement than the main players. However, the exchanges in which JP Morgan participated are characterised by their specific frequency and regularity, and JP Morgan's participation in the infringing conduct was intentional. Moreover, the conduct at issue is particularly serious. Consequently, the impact of the mitigating circumstances accepted on the final amount of the fine can be only marginal.

In conclusion, the Court finds that, on a fair assessment of the circumstances of the case, the amount of the fine should be set at EUR 337 196 000.

In the light of the foregoing, the Court annuls the contested decision in so far as it imposes a fine on JP Morgan, sets the fine at the same amount as that imposed by the Commission, namely EUR 337 196 000, and dismisses the action as to the remainder.

Judgment of the General Court (Tenth Chamber, Extended Composition), 20 December 2023, Crédit agricole et Crédit agricole Corporate and Investment Bank v Commission, T-113/17

Competition – Agreements, decisions and concerted practices – Euro Interest Rate Derivatives sector – Decision establishing an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Manipulation of the Euribor Interbank Benchmark Rates – Exchange of confidential information – Restriction of competition by object – Single and continuous infringement – 'Hybrid' procedure staggered over time – Presumption of innocence – Impartiality – Fines – Basic amount – Value of sales – Article 23(2) and (3) of Regulation (EC) No 1/2003 – Obligation to state reasons – Amending decision supplementing the statement of reasons – Equal treatment – Unlimited jurisdiction

In 2011, the Barclays banking group applied to the European Commission for leniency, informing it of the existence of a cartel in the Euro Interest Rate Derivatives (EIRD) sector.

Those EIRDs are linked to the Euro Interbank Offered Rate (Euribor), a set of benchmark interest rates intended to reflect the cost of euro-denominated interbank loans, or to the Euro Over-Night Index Average (EONIA), which fulfilled a function equivalent to that of Euribor, but with regard to daily rates. The Euribor rate is based on the individual quotes notified by the banks belonging to a panel made up of 47 financial institutions ('the Euribor panel').

Following the initiation of infringement proceedings by the Commission, the financial institutions Barclays, Deutsche Bank, Royal Bank of Scotland and Société générale decided to participate in a settlement procedure pursuant to Article 10a of Regulation (EC) No 773/2004. [96] At the end of that procedure, the Commission adopted, on 4 December 2013, a decision [97] finding that those institutions had participated in a single and continuous infringement with the object of distorting the normal course of pricing on the EIRD market.

Since the financial institutions Crédit agricole SA and Crédit agricole Corporate and Investment Bank (together, 'Crédit agricole'), JP Morgan and HSBC had not submitted a proposal for settlement, the Commission continued its investigation against them.

By decision of 7 December 2016, [98] the Commission found that Crédit agricole had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 16 October 2006 to 19 March 2007, in a single and continuous infringement with the object of distorting the normal course of pricing components on the EIRD market and imposed on it a fine of EUR 114 654 000.

According to the Commission, Crédit agricole's infringing conduct consisted of discussions between its traders and a trader of another financial institution belonging to the Euribor panel concerning, in essence, the manipulation of their banks' submissions to that panel for the purpose of the calculation of Euribor, trading positions as regards EIRDs and their pricing intentions and strategies concerning EIRDs.

Before the General Court, Crédit agricole seeks, first, the annulment in part of that decision, and, second, in the alternative, the annulment of the fine imposed or a reduction of the amount of that fine.

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96 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18), as amended.

97 Commission Decision C(2013) 8512 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD) (Settlement)) ('the settlement decision').

98 Commission Decision C(2016) 8530 final of 7 December 2016 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39914 – Euro Interest Rate Derivatives (EIRD)) ('the contested decision').

After the action was brought, the Commission adopted an amending decision [99] to supplement the statement of reasons provided in the light of the judgment in HSBC Holdings and Others v Commission, handed down by the Court in a related case. [100]

By its judgment, the Tenth Chamber (Extended Composition) of the General Court clarifies the criteria for establishing whether an undertaking participated in anticompetitive practices, in particular through the exchange of information, in the financial products sector. However, the Court annuls the contested decision in so far as it imposes a fine on Crédit agricole. It then exercises its unlimited jurisdiction and imposes on Crédit agricole a fine in an amount set at EUR 110 000 000.

Findings of the Court

As regards Crédit agricole's claim that the Commission failed to observe their rights of defence and the adversarial principle by refusing to answer, at the hearing before the hearing officer, certain questions concerning the method of calculating the penalty envisaged, , the Court states that, although the hearing officer has the option of allowing the parties to ask questions during the hearing, the main objective of that hearing is to give the opportunity in particular to the addressees of the statement of objections to develop their views as to the preliminary findings of the Commission. Moreover, the Commission is not required to provide, at the stage of the administrative procedure, details on how it intends to implement the criteria relating to the gravity and duration of the infringement in determining the amount of fines.

Similarly, the Commission did not fail to observe Crédit agricole's rights of defence by organising its access to certain documents in the file originating from other parties by means of the data room procedure. Since the information in question had not lost its confidential nature, despite its age, the data room procedure was an appropriate tool to reconcile Crédit agricole's rights of defence and the right to confidentiality of the banks that provided that information. Moreover, Crédit agricole had not demonstrated that it would have been better able to defend itself by obtaining full access to that information directly rather than through its external advisers.

Next, the Court confirms that there was infringing conduct attributable to Crédit agricole.

As regards Crédit agricole's participation in Euribor rate manipulation practices, the Court states that the exchanges between traders relied on against Crédit agricole in the contested decision clearly reveal the communication of rate preferences, of associated trading positions and of an offer or an intention on the part of the Crédit agricole traders to influence their bank's submission to the Euribor panel.

Moreover, the arguments put forward by Crédit agricole seeking to demonstrate the minor role that that institution played in the manipulations at issue are ineffective, since those factors, relating to the number and intensity of the incidents of anticompetitive conduct, are not material to the establishment of the existence of an infringement on the part of that institution, but only to the assessment of the gravity of the infringement or of mitigating circumstances and if and when it comes to determining the fine.

As regards the Commission's finding of a single infringement, the Court states that three factors are decisive for concluding that an undertaking participated in such an infringement:

(i) the various forms of conduct in question must form part of an 'overall plan' with a single objective;

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99 Commission Decision C(2021) 4610 final of 28 June 2021 amending the contested decision.

100 Judgment of 24 September 2019, HSBC Holdings and Others v Commission (T-105/17, EU:T:2019:675). That judgment was annulled in part by the judgment of the Court of Justice of 12 January 2023, HSBC Holdings and Others v Commission (C-883/19 P, EU:C:2023:11).

(ii) the undertaking must have been aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or have reasonably been able to foresee all that conduct and have been prepared to take the risk; and

(iii) the undertaking must have intended, through its own conduct, to contribute to the common objectives pursued by all the participants.

As regards the first factor, the Court finds that all the exchanges at issue have the single objective, as identified by the Commission, of influencing the cash flows payable under EIRDs to the detriment of the market participants not participating in those exchanges.

As regards the second factor, the Court notes that the Commission had direct evidence that Crédit agricole was aware that it was participating with other banks in concerted actions to manipulate the Euribor rate with a view to altering cash flows payable under EIRDs. Indeed, it is clear from the evidence put forward in the contested decision that its traders knew or could reasonably have foreseen that their exchanges seeking to manipulate the Euribor rate were part of an 'overall plan' going beyond the scope of bilateral exchanges.

By contrast, that is not the case with regard to the exchanges concerning pricing intentions and strategies, in respect of which the evidence relied on in the contested decision does not establish that Crédit agricole knew or could reasonably have foreseen that they went beyond the scope of bilateral exchanges and were part of an overall plan also involving other banks. In so far as concerns those exchanges, participation in a single infringement could not be attributed to Crédit agricole.

As regards the third factor, it is apparent from the exchanges relied on by the Commission against Crédit agricole that the traders involved intended to engage in anticompetitive practices.

Having thus confirmed in part the finding that Crédit agricole participated in the single and continuous infringement at issue, the Court rejects the request for annulment as far as the finding of an infringement was concerned, since that finding is justified to a sufficient legal standard by the findings that are not vitiated by error. However, the Court upholds the request for the annulment of the contested decision in so far as it imposes a fine in the amount of EUR 114 654 000 on Crédit agricole.

In that regard, the Court notes, first, that that penalty does not reflect Crédit agricole's participation in the single and continuous infringement since the Commission was wrong to attribute to it the conduct of the other banks in relation to the exchanges on pricing intentions and strategies that did not take place with a view to manipulating rates.

Second, the Court finds that the determination of the amount of the fine imposed on Crédit agricole is vitiated by an inadequate statement of reasons.

Although the Commission did not make an error of assessment by using, for the purpose of determining the amount of the fine imposed on Crédit agricole, discounted cash receipts as the proxy for the value of sales, it did not sufficiently explain why the discount factor applied to those receipts was set at 98.849%. Furthermore, since the Commission did not demonstrate that certain circumstances made it practically impossible to state to the requisite legal standard the reasons for the contested decision in that respect, the supplement to the statement of reasons provided in that regard in the amending decision cannot be accepted either, without it amending the operative part of the contested decision.

According to the Court, the Commission also breached its obligation to undertake a diligent examination since, despite there being sufficient evidence to question the uniformity of the methodologies followed by the banks concerned to calculate their cash receipts, it did not adopt additional investigative measures. However, such a failure to observe the principle of good administration could only lead to the annulment of the contested decision if Crédit agricole had demonstrated that, as a result of the methodological differences in question, the basic amounts of the fines imposed were calculated in breach of the principle of equal treatment. In the light of the immaterial impact of those differences on the level of the cash receipts, they are not liable to result in a breach of the principle of equal treatment in the present case.

Lastly, exercising its unlimited jurisdiction, the Court examines Crédit agricole's claim for a reduction of the amount of the fine that was imposed on it.

Noting that the fixing of a fine in the exercise of its unlimited jurisdiction is not an arithmetically precise exercise, the Court uses, as the Commission did in its approach, the value of discounted cash receipts as the initial data for determining the basic amount of the fine, since that value reflects the economic significance of the infringement and the strength of the undertaking in the infringement.

As regards determining the reduction factor, the application of which is necessary in order to prevent the imposition of a fine that is over-deterrent, the Court notes that the parties agree that that factor should be set at 98.849% at the very least.

With regard to the gravity of the infringement, the Court states that, since the conduct at issue relates to factors that are relevant to the determination of the prices of EIRDs, they are, by their very nature, among the most serious of restrictions to competition. In addition, the practices at issue are particularly serious and harmful since they are liable not only to distort competition on the EIRD market, but also, more broadly, to compromise the trust placed in the banking system and the financial markets as a whole and their credibility.

With regard to mitigating circumstances, the Court finds that Crédit agricole played a less important role in the infringement than the main players. However, participation in the infringing conduct was intentional. Moreover, the conduct at issue is particularly serious. Consequently, the impact of the mitigating circumstances accepted on the final amount of the fine can be only marginal.

In conclusion, the Court finds that, on a fair assessment of the circumstances of the case, the amount of the fine should be set at EUR 110 000 000.

In the light of the foregoing, the Court annuls the contested decision in so far as it imposes a fine on Crédit agricole, sets the fine at EUR 110 000 000 and dismisses the action as to the remainder.

5.2. CONCENTRATIONS

Judgment of the General Court (Fifth Chamber, Extended Composition), 20 December 2023, EVH v Commission, T-53/21

Competition – Concentrations – German electricity and gas markets – Decision declaring a concentration compatible with the internal market – Obligation to state reasons – Concept of 'single concentration' – Right to effective judicial protection – Right to be heard – Definition of the market – Period of analysis – Assessment of the effects of the transaction on competition – Manifest errors of assessment – Undertakings – Duty of diligence

In March 2018, RWE AG and E.ON SE, companies governed by German law, announced that they wanted to engage in a complex asset swap by means of three concentration operations ('the overall transaction').

By the first concentration operation, RWE, which is active across the whole supply chain of energy provision in several European countries, wished to acquire sole or joint control over certain generation assets of E.ON, an electricity provider which operates in several European countries. The second concentration operation consisted in the acquisition by E.ON of the sole control over the distribution and retail energy business, as well as some generation assets of Innogy SE, a subsidiary of RWE. As for the third concentration operation, it concerned the acquisition of 16.67% of E.ON's shares by RWE.

The first and second concentration operations were reviewed by the European Commission, while the third concentration operation was reviewed by the Bundeskartellamt (Federal Competition Authority, Germany).

In April 2018, the German undertaking EVH GmbH, which generates electricity on German territory from both conventional and renewable energy sources, notified the Commission of its wish to participate in the procedure relating to the first and second concentration operations and, consequently, to receive the documents relating thereto.

The second concentration operation was notified to the Commission on 31 January 2019. By decision of 7 March 2019, the Commission found that the concentration in question raised serious doubts as to its compatibility with the internal market and the Agreement on the European Economic Area (EEA) and that, consequently, it was necessary to initiate in-depth proceedings pursuant to Article 6(1)(c) of Regulation No 139/2004.[101] In the course of those proceedings, however, the Commission found, in view of the commitments offered by E.ON in order to remedy the competition-related issues identified by the Commission, that those commitments were sufficient to dispel the serious doubts as to the compatibility of the concentration with the internal market. Consequently, by decision of 17 September 2019, it declared the concentration compatible with the internal market and with the EEA Agreement. [102]

EVH [103] brought an action before the General Court seeking the annulment of the decision at issue. In dismissing the action in its entirety, the Court bases itself, in part, on considerations similar to those that led it to dismiss, by judgment of 17 May 2023, [104] the action brought by EVH against the Commission's decision declaring the first concentration operation compatible with the internal market, in particular, as regards the plea alleging incorrect division of the analysis of the overall transaction, the plea alleging infringement of the applicant's right to effective judicial protection and its pleas relating to the definition of the period of analysis. When asked, moreover, to rule on various errors identified by EVH as being such as to vitiate the analysis put forward by the Commission and the inferences drawn by it, in particular in the definition of the relevant markets and in the analysis of the effects of the operation in question on competition, the Court exercises its powers of judicial review in that regard, taking account of the specific characteristics of the analysis to be carried out by the Commission by virtue of its prerogatives in control of concentrations.

Findings of the Court

First of all, the Court dismisses a series of pleas alleging incorrect division of the analysis of the overall transaction, infringement of the obligation to provide a statement of reasons, infringement of the applicant's right to be heard and infringement of its right to effective judicial protection. As regards, more specifically, participation in the proceedings to which EVH could be entitled under the EC Merger Regulation, the Court observes that, in concentration control proceedings, when a third party requests to be heard and demonstrates a sufficient interest to that effect, it is for the Commission to inform it of the nature and object of the proceedings, in so far as is necessary to enable it effectively to put forward its views on the concentration, without thereby conferring on it a right of full access to all of the evidence in the file. In the present case, it is not disputed that the applicant was indeed aware of the nature and object of the proceedings at issue. In those conditions, EVH cannot criticise the Commission for having failed to provide it with all of the information in its possession or, consequently, of having disregarded its right to be heard.

Second, the Court examines the plea alleging manifest errors of assessment by the Commission in the assessment of the compatibility of the concentration at issue with the internal market. In that regard, the Court begins by observing that, in the exercise of the jurisdiction conferred on it by the EC Merger Regulation, the Commission has a certain discretionary power, in particular in respect of the complex

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101 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

102 Commission Decision of 17 September 2019 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.8870 – E.ON/Innogy).

103 It should be noted that 10 other undertakings also brought actions for annulment against that same decision. All of those actions are dismissed, either as being inadmissible (judgment of 20 December 2023, Stadtwerke Frankfurt am Main v Commission, T-63/21), or on the substance (judgments of 20 December 2023, Stadtwerke Leipzig v Commission (T-55/21), TEAG v Commission (T-56/21), Stadtwerke Hameln Weserbergland v Commission (T-58/21), eins energie in sachsen v Commission (T-59/21), Naturstrom v Commission (T-60/21), EnergieVerbund Dresden v Commission (T-61/21), GGEW v Commission (T-62/21), Mainova v Commission (T-64/21) and enercity v Commission (T-65/21)).

104 Judgment of 17 May 2023, EVH v Commission (T-312/20, EU:T:2023:252).

economic assessments it is called upon to carry out thereunder. Consequently, the review by the EU judicature of the exercise of that discretion must take account of the discretionary margin thus conferred on the Commission.

That said, the Court finds, first of all, that the examination of the conditions in which the Commission handled the file does not reveal anything supporting EVH's contention that the Commission's analysis was based on an incomplete set of relevant data. The Court observes in that regard that the Commission must reconcile the need to carry out a complete investigation in order to have all the relevant facts for its assessment in its possession with the need for speed by which it is bound in all concentration control proceedings. In those circumstances, the Court finds that the Commission cannot be criticised for having based itself solely on the information provided by the parties to the concentration where there is nothing to suggest that it is inaccurate, provided that that is all of the relevant data to be taken into consideration in order to appraise a complex situation. The Court further observes that the applicant may submit studies drawn up specifically in order to challenge the lawfulness of the contested decision, provided that they are not an attempt to modify the legal and the factual framework submitted to the Commission previously as part of the procedure that led to the adoption of the contested decision. In the present case, however, the studies produced by the applicant are based on different data than what existed at the time of adoption of the contested decision, with the result that they are not such as to demonstrate that the Commission failed to take account of certain data. The Court further finds that the first market investigation was conducted correctly, before finding that the plea alleging a failure to take certain data into account is without foundation.

Next, after finding that EVH may not criticise the Commission for having defined the period of analysis incorrectly for reasons relating essentially to the prospective nature of the analysis required of it, in accordance with the considerations set out on that point in its judgment of 17 May 2023, the Court turns to the examination of the pleas alleging incorrect definition of the relevant markets. [105]

In that regard, the Court rules, in the first place, on the definition of retail supply markets for electricity and gas, challenged, in the present case, in terms of both the product and the geographical range. Noting at the outset, that, in order to draw a distinction in the product market between customers benefiting from basic supply and those benefiting from special contracts, the Commission based itself on a competitive analysis of the substitutability between basic contracts and special contracts for supplying the customer base concerned, finding, in the present case, that it was insufficient, the Court finds that EVH has not succeeded in demonstrating the error of assessment allegedly made by the Commission in drawing, in view of the preceding finding, a distinction between those two modes of supply. Similarly, in the definition of the geographical market, nor did the Commission make a manifest error of assessment in finding that the retail supply of electricity and gas to households and small-scale commercial customers as part of the basic supply had a local dimension, limited to the basic supply area concerned, and that the retail supply of electricity and gas to households and small-scale commercial customers under the special contracts had a national dimension with local aspects.

In the second place, as regards the markets for metering services and electromobility, the Court finds that the applicant could not, conversely, criticise the Commission for having left open the question of the definition of the relevant product market, as it had stated explicitly that none of the market definitions enabled a finding that there was a significant hindrance to effective competition following the concentration, without any manifest error of assessment having been demonstrated on that point. The Court finds that the same holds true for when the Commission finds that there are anticompetitive effects, irrespective of the definition employed, provided that, following the

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105 In the present case, the activities pursued by the parties to the concentration operation concerned led the Commission to distinguish, for the purposes of its analysis, four overall markets, namely the markets for electricity and for gas, the market for metering services and the market for electromobility.

modifications made by the undertakings concerned, the concentration is no longer liable to hinder significantly effective competition, irrespective of the definition of relevant market.

Lastly, the Court examines the pleas alleging incorrect assessment of the effects of the concentration.

As regards, in the first place, the effects on the markets for the retail supply of electricity and gas, the examination of the evidence on which the Commission based its analysis does not reveal any manifest error of assessment by it, as it found that the concentration would not hinder significantly effective competition on the markets under consideration as part of the basic supply in Germany. It is also apparent from that examination that the Commission examined sufficiently the effects of the concentration on the markets under consideration in terms of the special contracts without committing any manifest error of assessment, in particular for the creation of capacity or incentives for a potential pricing strategy with negative margins to push out small competitors or to hold all of the first places in the internet price comparison rankings.

As regards, in the second place, the effects on the markets for the distribution of electricity and gas, the applicant may not criticise the Commission for having insufficiently examined the effects of the activities developed on those markets and for having conducted a manifestly incorrect assessment, in view of the evidence put forward by the Commission on that point.

In the third place, the Court reaches a similar conclusion in respect of the effects of the concentration on the markets for metering services and electromobility. As regards, more specifically, the latter, the Court finds that the Commission carried out a coherent and complete analysis, including off-motorway, of the competitive elements in terms of the smallest conceivable market, in particular in the light of the market share held by the parties to the concentration, their competitive proximity, the structure of the market and the barriers to entry; the applicant has not shown that the data used by the Commission were incorrect.

In the fourth and last place, the Court dismisses the plea alleging incorrect assessment of the effects of the customer solutions based on those customers' data. In those circumstances, the Court finds, lastly, that the Commission may not be criticised for having disregarded in any way its obligation of diligence in the exercise of its prerogatives.

In the light of those considerations, the Court therefore dismisses the action in its entirety.

6. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Banque postale v SRB, T-383/21

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 ex ante contributions – Obligation to state reasons – Principle of good administration – Principle of effective judicial protection – Plea of illegality – Limitation of the temporal effects of the judgment

La Banque postale ('the applicant') is a credit institution established in France.

On 14 April 2021, the Single Resolution Board (SRB) adopted a decision in which it set [106] the 2021 ex ante contributions to the Single Resolution Fund ('the SRF') of credit institutions and certain investment firms, one of which was the applicant ('the contested decision'). [107]

Hearing an action for annulment, which it upholds, against the contested decision, the General Court, after rejecting several pleas of illegality raised against Regulation No 806/2014, Delegated Regulation 2015/63 [108] and Implementing Regulation 2015/81, [109] provides significant clarification regarding, first, the scope of the SRB's obligation to state reasons and, second, the link between that obligation and compliance with the principles of good administration and of effective judicial protection.

Findings of the Court

In the first place, with regard to the plea alleging failure to fulfil the obligation to state reasons, the applicant alleged a failure to state reasons for the contested decision as regards the setting of the annual target level.

The Court recalls, first of all, that, in accordance with the applicable legislation, by the end of the initial period of eight years from 1 January 2016 ('the initial period'), the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all of the institutions authorised in the territories of all of the Member States participating in the SRM. Next, during the initial period, ex ante contributions must be spread out in time as evenly as possible until the final target level is reached. Furthermore, each year, the contributions due by all of the institutions authorised in the territories of all of the Member States participating in the SRM are not to exceed 12.5% of the final target level. In addition, as regards the methodology for calculating the ex ante contributions, the SRB is to determine the amount of those contributions on the basis of the annual target level by taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all the institutions authorised in the territories of the Member States participating in the SRM. Lastly, the SRB is to calculate the ex ante contribution for each institution on the basis of the annual target level, which must be established with reference to the final target level, and in accordance with the methodology set out in Delegated Regulation 2015/63.

In the present case, as is apparent from the contested decision, the SRB set the amount of the annual target level, for the 2021 contribution period, at EUR 11 287 677 212.56. In that decision, it explained, in essence, that the annual target level was to be determined on the basis of an analysis of the evolution of covered deposits in the previous years, any relevant developments in the economic situation and an analysis of the indicators relating to the phase of the business cycle and the effects that pro-cyclical contributions may have on the financial position of the institutions. The SRB considered it appropriate to set a coefficient based on that analysis and on the financial means available in the SRF ('the coefficient') and applied that coefficient to one eighth of the average amount of covered deposits in 2020, in order to obtain the annual target level. It subsequently set out the approach taken in order to determine the coefficient. In the light of those considerations, the SRB set the coefficient value at 1.35%. It then calculated the amount of the annual target level by multiplying

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106 In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

107 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 ex ante contributions to the Single Resolution Fund.

108 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

109 Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

the average amount of covered deposits in 2020 by that coefficient, and by dividing the result of that calculation by eight.

In that regard, although the SRB is required to provide the institutions, by means of the contested decision, with explanations concerning the methodology for determining the annual target level, such explanations must be consistent with the explanations provided by the SRB during the judicial proceedings and relating to the methodology actually applied. However, that is not the case in this instance.

At the hearing, the SRB stated that it had determined the annual target level for the 2021 contribution period using a methodology based on four stages, the last two of which consisted of deducting from the final target level the financial means available within the SRF, in order to calculate the amount that remained to be received until the end of the initial period, and by dividing that amount by three.

The Court observes that no reference is made to the last two stages of that calculation in the mathematical formula which is presented in the contested decision as the basis for determining the amount of the annual target level.

Furthermore, that finding cannot be called into question by the SRB's assertion that, in May 2021, it published the Fact Sheet, which contained a range indicating the potential amounts of the final target level, and, on its website, the amount of the financial means available in the SRF. Irrespective of whether the applicant was actually aware of those amounts, they were not, in themselves, such as to enable it to understand that the last two stages of the calculation had actually been applied by the SRB, and it should be noted, moreover, that the mathematical formula did not even mention them.

Similar inconsistencies also affect the manner in which the coefficient of 1.35% was set, which nonetheless plays a crucial role in that mathematical formula. It follows from the explanations provided by the SRB at the hearing that that coefficient was set in such a manner as to justify the result of the calculation of the amount of the annual target level, that is to say, after the SRB calculated that amount in accordance with the four stages of the methodology actually applied. That approach is not in any way apparent from the contested decision.

Moreover, the range within which, according to the Fact Sheet, the amount of the estimated final target level was set is inconsistent with the range of the growth rate of covered deposits, which is between 4% and 7% as set out in the contested decision. The SRB stated at the hearing that, for the purpose of determining the annual target level, it had taken into account the 4% growth rate of covered deposits – which was the lowest rate in the second range – and that it had thus obtained the estimated final target level of EUR 75 billion – which was the highest value in the first range. It is therefore apparent that there is a discrepancy between those two ranges. In those circumstances, the applicant was not in a position to ascertain the manner in which the SRB had used the range relating to the rate of growth of those deposits in order to arrive at the calculation of the estimated final target level.

The Court considers that, as regards the determination of the annual target level, the methodology actually applied by the SRB, as explained at the hearing, does not correspond to the one described in the contested decision, with the result that the actual reasons, in the light of which that target level was set, could not be identified on the basis of the contested decision either by the institutions or by the Court. The contested decision is therefore vitiated by defective reasoning as regards the determination of the annual target level.

In the second place, as regards the pleas alleging that the SRB infringed the principle of good administration and of the principle of effective judicial protection, the applicant's arguments concerned more specifically the lack of data, in the contested decision, relating to the setting of the 'covered deposit adjustment rate' used to determine the annual target level, namely the coefficient.

In that regard, the Court recalls that the SRB failed to fulfil the obligation to state reasons as regards the setting of the annual target level.

It follows from Article 41(2)(c) of the Charter of Fundamental Rights of the European Union and from the case-law that the statement of the reasons for the decision of an EU body is a requirement for ensuring that the principles of good administration and of effective judicial protection are effective.

The Court infers therefrom that the defective statement of reasons for the contested decision, with regard to the determination of the annual target level, also constitutes an infringement of the principle of good administration and of the principle of effective judicial protection. It therefore upholds the pleas raised.

In view of the heads of illegality which vitiate the contested decision, the Court annuls the contested decision in so far as it concerns the applicant.

Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision, in so far as it concerns the applicant, until the entry into force, within a reasonable period which cannot exceed six months from the date of delivery of the present judgment, of a new decision of the SRB determining the applicant's ex ante contribution to the SRF for the 2021 contribution period.

Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Landesbank Baden-Württemberg v SRB, T-389/21

Link to the full text of the judgment

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 ex ante contributions – Obligation to state reasons – Effective judicial protection – Equal treatment – Principle of proportionality – SRB's margin of discretion – Plea of illegality – Commission's margin of discretion – Limitation of the temporal effects of the judgment

The Landesbank Baden-Württemberg ('the applicant') is a public credit institution established in Germany. It is a member of the institutional protection scheme ('the IPS') of the Sparkassen-Finanzgruppe (Savings Banks Finance Group, Germany).

On 14 April 2021, the Single Resolution Board (SRB) adopted a decision in which it set [110] the 2021 ex ante contributions to the Single Resolution Fund ('the SRF') of banking institutions, one of which was the applicant ('the contested decision').

Hearing an action for annulment against the contested decision, the General Court rules on several novel questions regarding the calculation of ex ante contributions to the SRF and on various pleas of illegality raised against Delegated Regulation 2015/63, [111] all of which it rejects.

The judgment in its entirety is innovative. The Court ultimately annuls the contested decision on the ground that the SRB infringed its obligation to state reasons.

Findings of the Court

As a first step, the Court rejects all the pleas of illegality raised by the applicant.

In particular, in the first place, it rejects the plea of illegality alleging infringement of the principle of legal certainty of the risk pillar 'additional risk indicators to be determined by the [SRB]'.

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110 In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

111 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

It must be recalled that, under Articles 6 and 7 of Delegated Regulation 2015/63, it is for the SRB to adjust the basic annual contribution of institutions, taking into account the four risk pillars, each pillar consisting of risk indicators that, in turn, may consist of risk sub-indicators.

That Article 6 grants a margin of discretion to the SRB, with regard to the way in which it must 'take into account', for the purposes of those risk indicators, 'the probability that the institution concerned would enter resolution and … the consequent probability of making use of the resolution financing arrangement where the institution would be resolved'.

Thus, as regards the first risk indicator that falls under the risk pillar 'additional risk indicators to be determined by the [SRB]' and that relates to trading activities, off-balance sheet exposures, derivatives, complexity and resolvability, the SRB must take several sub-indicators into account when determining it, some of which may result in increasing the risk profile of the institution concerned and others may decrease it. Those risk sub-indicators do not include details concerning the implementation of the comparison that they involve.

In respect of the IPS risk indicator, the SRB has a margin of discretion regarding the fulfilment of the conditions related, first, to the sufficiency of the available funds of the IPS concerned in relation to the funds necessary to finance the institution in question, and, second, the degree of legal or contractual certainty concerning the funds. The SRB also has a margin of discretion with regard to the weighting of the various risk indicators in risk pillar IV, [112] for the purpose of determining the weighting of the various sub-indicators of risk constituting those risk indicators, which must be taken into account. [113]

The Court thus examines whether Article 6(5) and (7) and Article 7(4) of Delegated Regulation 2015/63 may be regarded as provisions that indicate sufficiently clearly the scope of the discretion conferred on the SRB and for the manner of its exercise, in the light of the legitimate aim in question, with the result that they provide adequate protection against arbitrary interference and that individuals may resolve with sufficient certainty any doubts as to the scope or meaning of those provisions.

In the present case, first, the Court notes that the applicable legislation provides for the result to be achieved, according to which the available financial means of the SRF must reach the final target level by the end of an initial period of eight years from 1 January 2016 ('the initial period'), and a method for achieving that result, which reduces the impact of the discretion exercised by the SRB when determining the ex ante contributions. On the one hand, the amount of the ex ante contribution of each institution depends on the amount of the annual target level that is determined by the SRB on the basis of its estimate of the amount corresponding, on 31 December 2023, to at least 1% of covered deposits in all the Member States participating in the Single Resolution Mechanism (SRM). [114] On the other, the ex ante contribution of each institution is determined, inter alia, on the basis of the basic annual contribution, which is calculated on the basis of the amounts of the net liabilities of the institutions concerned. The SRB does not exercise any discretion in determining those amounts. Furthermore, the institution concerned is aware of the amount of its net liabilities and may have access to the overall amount of the net liabilities of other institutions.

Second, the risk indicators the lack of clarity of which is argued by the applicant and in respect of which the SRB exercises some discretion affect the institution's risk profile only at a level below 20%. Furthermore, the impact of those indicators on the final amount of the ex ante contribution is further reduced by the fact that the SRB does not exercise any discretion in determining the amount of the basic annual contribution and that the adjustment of that contribution in respect of an institution's risk profile is clearly delineated within a pre-defined range from 0.8 to 1.5. [115]

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112 Pursuant to Article 7(4) of Delegated Regulation 2015/63.

113 In accordance with Article 6(5) to (7) of Delegated Regulation 2015/63.

114 Pursuant to Article 69(1) and (2) of Regulation No 806/2014.

115 In accordance with Article 9(3) of Delegated Regulation 2015/63.

The Court concludes therefrom that the scope of the discretion conferred on the SRB [116] and the manner of its exercise cannot be regarded as insufficiently delineated or as indicated with insufficient clarity, having regard to the legitimate aim in question, and cannot therefore be regarded as not providing adequate protection against arbitrary interference. That is all the more so since the applicant is a prudent trader which is able, if need be by making use of the services of a legal and economic advisor, to foresee in a sufficiently precise manner the method of calculation and order of magnitude of its ex ante contribution.

In the second place, the Court rejects the plea of illegality alleging that differentiation between institutions belonging to the same IPS on the basis of the risk indicator 'trading activities and off-balance-sheet exposures, derivatives, complexity and resolvability' is inconsistent with the uniform and consistent treatment of all the members of such an IPS, which is required by Directive 2014/59 [117] and Regulation No 575/2013. [118] After finding that, where several institutions are part of the same IPS, institutions which are given a better weighting in relation to the risk indicator 'trading activities and off-balance-sheet exposures, derivatives, complexity and resolvability' over other members of that IPS may be given a more favourable weighting in connection with the IPS risk indicator compared with those other members, the Court observes that, as regards Directive 2014/59, it is not provided for that, when it adopted Delegated Regulation 2015/63, the Commission had to assign the same weighting to all institutions which are part of the same IPS. Furthermore, the Commission enjoys broad discretion in respect of the adjustment method for the basic annual contributions. First of all, the Commission and the SRB explained, without the applicant putting forward any evidence to dispute their assertions, that the members of an IPS do not have an unconditional right to receive unconditional support from such an IPS, next, the failure of an institution with a large and complex balance sheet could entirely exhaust the funds of such an IPS and, last, the risk indicator 'trading activities and off-balance-sheet exposures, derivatives, complexity and resolvability' makes it possible to assess whether an institution has a large and complex balance sheet. With regard to Regulation No 575/2013, Article 113(7) thereof defines the conditions for granting permission in respect of an IPS and not the calculation of ex ante contributions and does not prohibit differentiating between institutions which are members of the same IPS for the purpose of calculating ex ante contributions. Furthermore, that provision does not go as far as to require that an IPS have sufficient resources to avoid the resolution of all its members, including all large institutions.

In the third place, the Court rejects the plea of illegality alleging infringement of the principle of equal treatment. It recalls that the specific nature of ex ante contributions consists in ensuring, according to an insurance-based logic, that the financial sector provides adequate financial resources for the SRM to be able to fulfil its functions, while encouraging the adoption, by the institutions concerned, of less risky methods of operation. Accordingly, not all institutions belonging to an IPS necessarily find themselves in a comparable situation simply because they belong to it. First of all, the members of an IPS do not have an unconditional right to receive support from the IPS that would cover all their commitments. Next, the failure of an institution with a large and complex balance sheet could entirely exhaust the funds of an IPS, unlike the failure of institutions with smaller and simpler balance sheets. Last, the risk indicator 'trading activities and off-balance-sheet exposures, derivatives, complexity and resolvability' is an objective criterion for assessing which institutions are in a comparable situation in terms of such risk.

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116 Pursuant to Article 6(5) to (7) and Article 7(4) of Delegated Regulation 2015/63.

117 Article 103(7)(h) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

118 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1), Article 113(7).

In the fourth place, the Court rejects the plea of illegality alleging infringement of several higher-ranking rules of law. In that regard, it notes that, in so far as it is necessary to take into account the objectives of the SRM and, in particular, the objective of encouraging institutions to adopt less risky methods of operation, the 'binning' method, consisting of assigning institutions to the same 'bin' even though they have considerably different values for the same risk indicator, does not infringe the principle of proportionality since those institutions have different characteristics with regard to the degree of risk measured by that indicator. Although those institutions are treated equally, that treatment is duly justified in so far as, first, it relates to the permitted objective, which is lawfully pursued, consisting in the laying down of general rules which can be easily applied and are easily verified by the competent authorities and, second, having regard to the broad discretion enjoyed by the Commission, the binning method in question makes it possible to achieve the objective pursued, does not exceed the limits of what is necessary to achieve it and cannot be regarded as entailing a disproportionate disadvantage.

In the fifth place, the Court rejects the plea of illegality alleging infringement of a 'requirement of risk-appropriate assessment of contributions' in so far as Article 20(1) of Delegated Regulation 2015/63 is vitiated by a manifest error of assessment, on the ground that that provision prevents the SRB from adjusting, in an appropriate manner, the basic annual contributions in respect of the actual risk profile of the institutions. Under that article, entitled 'Transitional provisions', a risk indicator is not to apply until the information required by a specific risk indicator as referred to in Annex II to that delegated regulation is included in the supervisory reporting requirement referred to in Article 14 thereof. Delegated Regulation 2015/63 was adopted on the basis of Article 103(7) of Directive 2014/59, which requires the Commission to take into account all of the factors listed in points (a) to (h) of that provision in order to specify the notion of 'adjusting contributions in proportion to the risk profile of institutions'.

Nevertheless, in the light of the broad discretion enjoyed by the Commission as regards the implementation of that provision, it may be necessary to provide for transitional periods for that purpose. Article 20(1) of Delegated Regulation 2015/63 introduces such a period, since it empowers the SRB, on a transitional basis, not to apply some of those factors, which are reflected in the risk indicators provided for in that delegated regulation.

Furthermore, the justification for the transitional period provided for by that provision is closely linked to the gradual nature of the process of establishing prudential requirements and the corresponding reporting requirements. In that context, Article 20(1) of Delegated Regulation 2015/63 seeks to avoid disproportionate or discriminatory burdens being imposed, as the case may be, on institutions when calculating ex ante contributions precisely because of that gradual implementation of prudential requirements and the corresponding reporting requirements.

Last, although that exception may lead to a situation in which certain risk indicators remain unapplied throughout the initial period, first, such a consequence stems from the gradual implementation of prudential requirements and, second, those risk indicators are also intended to apply beyond the initial period.

As a second step, the Court examines the pleas relating to the legality of the contested decision and upholds the plea alleging defects in the reasoning of that decision as regards the determination of the annual target level.

As regards the latter plea, which is a matter of public policy, as a preliminary point, the Court recalls, first of all, that, in accordance with the applicable legislation, by the end of the initial period, the available financial means of the SRF must reach the final target level, which corresponds to at least 1% of the amount of covered deposits of all the institutions authorised in the territories of all of the Member States participating in the SRM. Next, during the initial period, ex ante contributions must be spread out in time as evenly as possible until the final target level is reached. Furthermore, each year, the contributions due by all of the institutions authorised in the territories of all of the Member States participating in the SRM are not to exceed 12.5% of the final target level. In addition, as regards the methodology for calculating the ex ante contributions, the SRB is to determine the amount of those contributions on the basis of the annual target level by taking into account the final target level, and on the basis of the average amount of covered deposits in the previous year, calculated quarterly, of all the institutions authorised in the territories of the Member States participating in the SRM. Last,

the SRB is to calculate the ex ante contribution for each institution on the basis of the annual target level, which must be established with reference to the final target level, and in accordance with the methodology set out in Delegated Regulation 2015/63.

In the present case, as is apparent from the contested decision, the SRB set the amount of the annual target level, for the 2021 contribution period, at EUR 11 287 677 212.56. In that decision, it explained, in essence, that the annual target level was to be determined on the basis of an analysis of the evolution of covered deposits in the previous years, any relevant developments in the economic situation and an analysis of the indicators relating to the phase of the business cycle and the effects that pro-cyclical contributions may have on the financial position of the institutions. The SRB considered it appropriate to set a coefficient based on that analysis and on the financial means available in the SRF and applied that coefficient to one eighth of the average amount of covered deposits in 2020, in order to obtain the annual target level. It subsequently set out the approach taken in order to determine the coefficient. In the light of those considerations, the SRB set the coefficient value at 1.35%. It then calculated the amount of the annual target level by multiplying the average amount of covered deposits in 2020 by that coefficient, and by dividing the result of that calculation by eight.

In that regard, although the SRB is required to provide the institutions, by means of the contested decision, with explanations concerning the methodology for determining the annual target level, such explanations must be consistent with the explanations provided by the SRB during the judicial proceedings and relating to the methodology actually applied. However, that is not the case in this instance.

At the hearing, the SRB stated that it had determined the annual target level for the 2021 contribution period using a methodology based on four stages, the last two of which consisted of deducting from the final target level the financial means available within the SRF, in order to calculate the amount that remained to be received until the end of the initial period, and by dividing that amount by three.

The Court observes that no reference is made to the last two stages of that calculation in the mathematical formula which is presented in the contested decision as the basis for determining the amount of the annual target level.

It is true that the applicant was aware of a Fact Sheet, published by the SRB after the adoption of the contested decision but before the present action was brought, which indicated the estimated amount of the final target level. However, even if the applicant was also aware of the amount of the financial means available in the SRF, those circumstances alone were not such as to enable it to understand that the last two stages had actually been applied by the SRB, and it should be noted, moreover, that the mathematical formula provided for in the contested decision did not even mention them.

Similar inconsistencies also affect the manner in which the coefficient of 1.35% was set, which nonetheless plays a crucial role in that mathematical formula. As the SRB acknowledged at the hearing, that coefficient was set in such a manner as to justify the result of the calculation of the amount of the annual target level, that is to say, after the SRB calculated that amount in accordance with the four stages of the methodology actually applied. That approach is not in any way apparent from the contested decision.

Moreover, the range within which, according to the Fact Sheet, the amount of the estimated final target level was set is inconsistent with the range of the growth rate of covered deposits, which is between 4% and 7% as set out in the contested decision. In those circumstances, the applicant was not in a position to ascertain the manner in which the SRB had used the range relating to the rate of growth of those deposits in order to arrive at the calculation of the estimated final target level.

The Court considers that, as regards the determination of the annual target level, the methodology actually applied by the SRB, as explained at the hearing, does not correspond to the one described in the contested decision, with the result that the actual reasons, in the light of which that target level was set, could not be identified on the basis of the contested decision either by the institutions or by the Court. The contested decision is therefore vitiated by defective reasoning as regards the determination of the annual target level.

After rejecting the other substantive pleas, examined in the interests of the proper administration of justice, the Court concludes that the failure to state reasons which vitiates the contested decision is, in itself, such as to justify the annulment of that decision in so far as it concerns the applicant.

Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision, in so far as it concerns the applicant, until the entry into force, within a reasonable period which cannot exceed six months from the date of delivery of the present judgment, of a new decision of the SRB determining the applicant's ex ante contribution to the SRF for the 2021 contribution period.

7. CONSUMER PROTECTION: CONSUMER CREDIT CONTRACTS

Judgment of the Court of Justice (Grand Chamber), 21 December 2023, BMW Bank, C-38/21, C-47/21 and C-232/21

Link to the full text of the judgment

Reference for a preliminary ruling – Consumer protection – Leasing agreement for a motor vehicle without an obligation to purchase – Directive 2008/48/EC – Article 2(2)(d) – Concept of a leasing agreement without an obligation to purchase the object of the agreement – Directive 2002/65/EC – Article 1(1) and Article 2(b) – Concept of a contract for financial services – Directive 2011/83/EU – Article 2(6) and Article 3(1) – Concept of a service contract – Article 2(7) – Contract of a distance contract – Article 2(8) – Concept of an off-premises contract – Article 16(l) – Exception from the right of withdrawal in respect of the provision of car rental services – Credit agreement for the purchase of a motor vehicle – Directive 2008/48 – Article 10(2) – Requirements relating to the information that must be stated in the agreement – Presumption of compliance with the obligation to provide information in the case of use of a statutory information model – Absence of horizontal direct effect of a directive – Article 14(1) – Right of withdrawal – Start of the withdrawal period in the event of incomplete or incorrect information – Abusive nature of the exercise of the right of withdrawal – Time-barring of the right of withdrawal – Obligation to return the vehicle in advance in the event of exercise of the right of withdrawal in respect of a linked credit agreement

The three joined cases form part of several disputes between consumers and financial institutions linked to motor vehicle dealerships, regarding the validity of the exercise of those consumers' right of withdrawal concerning, respectively, a leasing agreement for a motor vehicle without an obligation to purchase (Case C-38/21) and a number of credit agreements intended to finance the purchase of second-hand motor vehicles (Cases C-47/21 and C-232/21).

In Case C-38/21, VK visited the premises of a BMW motor vehicle dealership where one of the latter's employees, acting as a credit intermediary for BMW Bank GmbH, offered VK a leased motor vehicle and set out the various aspects of that type of agreement, such as the duration and monthly instalments. In November 2018, VK, using a means of distance communication, concluded a leasing agreement with BMW Bank in respect of a motor vehicle for private use. Under that agreement, concluded for 24 months and based on a loan being granted by BMW Bank, VK was not required to purchase the vehicle at the end of the contractual period. On 25 June 2020, VK stated that he wished to withdraw from the leasing agreement. He took the view that the 14-day withdrawal period provided for under national law had not yet started to run because the information that should have been provided to him under that law was insufficient and illegible.

In Cases C-47/21 and C-232/21, several consumers concluded loan agreements for the purchase of second-hand vehicles for private use. When those agreements were prepared and concluded, the car dealers from which the vehicles were purchased acted as intermediaries for C. Bank AG (Case C-47/21) and for Volkswagen Bank GmbH and Audi Bank (Case C-232/21). Those consumers subsequently withdraw from the loan agreements, essentially seeking repayment of the monthly

instalments which they had paid up to the date of withdrawal. According to those consumers, the 14-day withdrawal period provided for under national law had not yet started to run because the information on the right of withdrawal and the other mandatory pieces of information had not been duly provided to them.

In its judgment, delivered by the Grand Chamber, the Court of Justice explains, in the context of a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, the scope of Directives 2002/65, [119] 2008/48 [120] and 2011/83 [121] on consumer protection and the scope of the concepts of 'service contract', 'distance contract' and 'off-premises contract' within the meaning of Directive 2011/83. The Court also rules, in the context of credit agreements, on several aspects of the obligation on creditors, under Directive 2008/48, to provide consumers with information on, inter alia, the right of withdrawal and on the consequences of providing incorrect or incomplete information on the exercise of that right. The Court also deals with, in the same context and under the same directive, the issue of a consumer's abusive exercise of the right of withdrawal and the issue of when that right is time-barred.

Findings of the Court

In the first place, the Court examines the nature of a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, in the light of Directives 2002/65, 2008/48 and 2011/83.

As regards, first, Directive 2011/83, the Court rules that a leasing agreement for a motor vehicle, which is characterised by the fact that neither that agreement nor a separate agreement provides that the consumer is required to purchase the vehicle upon the expiry of the agreement, falls within the scope of that directive, as a 'service contract' within the meaning of Article 2(6) thereof. [122] That concept is defined broadly and must be understood as including all agreements which do not fall within the concept of a 'sales contract' provided for in that directive. [123] In the present case, a leasing agreement by which a trader undertakes to provide a consumer with a vehicle in return for payment by instalments without an obligation to purchase that vehicle at the end of the lease does not fall within that concept given that it does not provide for the transfer of ownership of the vehicle to the consumer. Such a leasing agreement also does not come under the list of contracts excluded from the scope of Directive 2011/83. [124]

Second, the Court finds that such an agreement does not fall within the scope of Directive 2008/48. Although it does fall with the scope of a 'leasing agreement' under that directive, [125] it is nevertheless expressly excluded from the scope of that directive because it is not coupled with an obligation on the consumer to purchase the object of the agreement at the end of the latter.

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119 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).

120 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (JO 2008, L 133, p. 66).

121 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

122 Under Article 2(6) of Directive 2011/83, the concept of a 'service contract' means 'any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof'.

123 Under Article 2(5) of Directive 2011/83, a 'sales contract' means 'any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services'.

124 As laid down in Article 3(3) of Directive 2011/83.

125 Within the meaning of Article 2(2)(d) of Directive 2008/48.

Third, as regards Directive 2002/65, the Court also finds that a leasing agreement for a motor vehicle, which is characterised, inter alia, by the fact that neither that agreement nor a separate agreement provides that the consumer is required to purchase the vehicle upon the expiry of the agreement, does not fall with the scope of that directive. The Court states that, in order to fall within the scope of that directive, the purpose of an agreement must be, inter alia, the provision of a 'financial service', [126] such as a service of a credit nature. Although it is true that a leasing agreement for a motor vehicle without an obligation to purchase comprises both a credit element and a rental element, the Court states that such an agreement does not differ, for the most part, from a long-term car rental agreement. Since the main purpose of that type of agreement is the rental of the vehicle, it cannot be classified as a contract for a financial service of a credit nature.

In the second place, in the context of the interpretation of Directive 2011/83 as regards a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, the Court considers, first, the concepts of a 'distance contract' [127] and an 'off-premises contract'. [128]

Thus, the Court states, on the one hand, that a service contract concluded between a consumer and a trader by using a means of distance communication cannot be classified as a 'distance contract' where the stage which prepared the ground for the conclusion of the contract took place in the simultaneous physical presence of the consumer and an intermediary acting in the name or on behalf of the trader, who provided the consumer with all the information referred to in Directive 2011/83, [129] enabling that consumer ask that intermediary questions about the proposed contract or offer in order to remove any uncertainty as to the scope of his or her possible contractual commitment with the trader.

On the other hand, the Court finds that a service contract concluded between a consumer and a trader, cannot be classified as an 'off-premises contract', where, during the stage preparing the ground for the conclusion of the contract through the use of a means of distance communication, the consumer visited the business premises of an intermediary acting in the name or on behalf of the trader for the purposes of the negotiation of that contract but operating in a field of activity other than that of the trader, provided that two conditions are met: (1) the consumer must have been able to expect, as an average consumer who is reasonably well informed and reasonably observant and circumspect, by visiting the business premises of the intermediary, to be solicited by that intermediary for the purposes of the negotiation and conclusion of a service contract with the trader and (2) the consumer must have been able easily to understand that that intermediary was acting in the name or on behalf of that trader.

Second, examining the exceptions provided for in Article 16 of Directive 2011/83 under which the consumer does not have a right of withdrawal in certain situations, the Court finds that a leasing agreement for a motor vehicle, concluded between a trader and a consumer and classified as a distance or off-premises service contract within the meaning of that directive, comes under the exception relating to the provision of car rental services coupled with a specific date or period of performance, [130] where the main purpose of such an agreement is to allow the consumer to use a

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126 Under Article 2(b) of Directive 2002/65, 'any service of a banking, credit, insurance, personal pension, investment or payment nature' comes under the concept of a financial service.

127 Under Article 2(7) of Directive 2011/83, that concept covers 'any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'.

128 Under Article 2(8) of Directive 2011/83, that concept covers 'any contract between the trader and the consumer concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader'.

129 In particular in Article 6 of Directive 2011/83.

130 Article 16(l) of Directive 2011/83 concerns the exception regarding 'the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance'.

vehicle for the specific period of time stipulated in that agreement, in return for the regular payment of sums of money. In that regard, the Court states, on the one hand, that the term 'specific' to which that exception refers is also capable of covering long-term rental agreements, such as the 24-month leasing agreement in the case in the main proceedings, provided that that duration is set out in sufficient detail in the agreement. On the other hand, the Court states that, in the context of a leasing agreement for a vehicle that is acquired specifically at the consumer's request in order to meet the latter's specifications, the trader might, where the consumer has a right of withdrawal, find it difficult to put the vehicle to different use. As a result of, inter alia, those specifications, the trader might not succeed, within a reasonable period following the exercise of the right of withdrawal, in putting the vehicle to another equivalent use for the period corresponding to the duration of the originally planned lease, without suffering significant financial loss.

In the third place, in the context of the interpretation of Directive 2008/48, the Court states, first of all, that the loan agreements for the purchase of second-hand motor vehicles for private use, at issue in Cases C-47/21 and C-232/21, fall within the scope of Directive 2008/48 as credit agreements. [131]

Next, the Court explains the extent of the trader's obligation in respect of the information that is to be provided in credit agreements falling within the scope of that directive [132] and, inter alia, the extent of the trader's obligation to provide information regarding the right of withdrawal. [133] Thus, the Court rules that that obligation precludes national legislation establishing a statutory presumption that the trader has complied with its obligation to inform the consumer of his or her right of withdrawal where that trader refers, in a contract, to national provisions which themselves refer to a statutory information model regarding the right of withdrawal, while using terms set out in that model which do not comply with the requirements of Directive 2008/48. [134] If it is not possible to interpret such national legislation in a manner consistent with that directive, a national court hearing a dispute exclusively between private individuals is not required, solely on the basis of EU law, to disapply such legislation, without prejudice to the possibility for that court to disapply it on the basis of its domestic law and, failing that, without prejudice to the right of the party harmed as a result of national law not being in conformity with EU law to claim compensation for the resulting loss which he or she has suffered.

Lastly, the Court rules on the various aspects relating to the right of withdrawal, as provided for in Directive 2008/48. [135]

First, it explains the point at which the withdrawal period starts to run. In that regard, where information provided by the creditor to the consumer under that directive [136] proves to be incomplete or incorrect, the 14-day withdrawal period provided for in Directive 2008/48 starts to run only if the incompleteness or incorrectness of that information is not capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under that directive or his or her decision to conclude the contract and, where relevant, is not capable of depriving him or her of the possibility of exercising his or her rights, in essence, under the same conditions as would have prevailed if that information had been provided in a complete and correct manner. The provision of incomplete or incorrect information may be treated as a failure to provide information only if the consumer is thereby misled as to his or her rights and obligations, and if, therefore, he or she is led to conclude a

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131 In accordance with Article 2(1) of Directive 2008/48.

132 As laid down in Article 10(2) of Directive 2008/48.

133 Article 10(2)(p) of Directive 2008/48 sets out the obligation to include, in credit agreements, information on the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise of that right.

134 Article 10(2)(p) of Directive 2008/48.

135 Under Article 14(1) of Directive 2008/48, a consumer has a period of 14 calendar days in which to withdraw from the credit agreement without giving any reason.

136 Under Article 10(2) of Directive 2008/48.

contract which he or she might not have concluded if all the complete and materially correct information had been available to him or her.

Second, the Court analyses what effect the full performance of a credit agreement has on the continuance of the right of withdrawal. It thus finds that the full performance of such an agreement extinguishes that right. Since the performance of a contract constitutes the natural mechanism for extinguishing contractual obligations, a consumer can no longer rely on his or her right of withdrawal once the credit agreement has been performed in full by the parties and the mutual obligations arising from that agreement have therefore come to an end.

Third, as regards the issue of a consumer exercising his or her right of withdrawal, the Court rules that a creditor cannot validly plead that, on account of the consumer's conduct between the conclusion of the agreement and the exercise of the right of withdrawal, the consumer exercised that right abusively where, due to the incompleteness or incorrectness of the information in the credit agreement, in breach of Directive 2008/48, the withdrawal period has not begun to run because the incompleteness or incorrectness of that information affected the consumer's ability to assess the extent of his or her rights and obligations under Directive 2008/48 and his or her decision to conclude the agreement.

Fourth, ruling on whether the right of withdrawal can be time-barred, the Court states that Directive 2008/48 precludes a creditor from being able to plead, where the consumer exercises his or her right of withdrawal in accordance with the conditions laid down in that directive, [137] that that right is time-barred where at least one of the mandatory pieces of information referred to in that directive [138] was not included in the credit agreement or was set out in it in an incomplete or incorrect manner without being duly communicated subsequently and where, on that ground, the withdrawal period has not started to run. Directive 2008/48 does not lay down any temporal limitation of the consumer's exercise of his or her right of withdrawal in the situation that has just been stated. The national legislation cannot therefore impose such a limitation.

Fifth, the Court examines the effects of the right of withdrawal. It thus states that that right, read in conjunction with the principle of effectiveness, precludes national legislation which provides that, where the consumer withdraws from a linked credit agreement, [139] he or she must return to the creditor the goods financed by the credit or must have given the creditor formal notice to take back those goods without that creditor being required, at the same time, to repay the monthly instalments of the credit already paid by the consumer. Subject to the checks which it is for the referring court to carry out, national procedural rules requiring a borrower who withdraws from such an agreement to return to the creditor the goods financed by the credit or to have given the creditor formal notice to take back those goods without that creditor being under an obligation to repay, at the same time, the monthly instalments of the credit already paid, are capable, in practice, of making it impossible or excessively difficult for the right of withdrawal to be exercised.

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137 As set out in Article 14(1) of Directive 2008/48.

138 As laid down in Article 10(2) of Directive 2008/48.

139 Within the meaning of Article 3(n) of Directive 2008/48.

8. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (First Chamber, Extended Composition), 20 December 2023, Islentyeva v Council, T-233/22

Link to the full text of the judgment

Action for annulment – Common foreign and security policy – Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine – Prohibition on any non-Russian-registered aircraft owned, chartered or otherwise controlled by any Russian natural or legal person, entity or body, from landing in, taking off from, or overflying the territory of the European Union – Article 4e of Decision 2014/512/CFSP – Lack of jurisdiction of the General Court – Article 3d of Regulation (EU) No 833/2014 – Lack of locus standi – Inadmissibility)

The applicant, who has dual Luxembourg and Russian citizenship, holds a private pilot license issued by the Directorate for Civil Aviation of the Grand Duchy of Luxembourg ('the DAC'). To carry out flights over the territory of the European Union, she used aircraft belonging to a Luxembourg company established at Luxembourg Airport (Luxembourg).

Following the Russian Federation's aggression against Ukraine at the beginning of 2022, the European Union imposed a series of restrictive measures in view of that situation, including Decision 2022/335 [140] ('the contested decision') and Regulation 2022/334 [141] ('the contested regulation').

Those acts are intended, inter alia, to deny any aircraft operated by Russian air carriers, any Russian-registered aircraft, and any non-Russian-registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body permission to land in, take off from, or overfly the territory of the European Union. [142]

The European Commission and the European Aviation Safety Agency subsequently stated that the prohibition introduced by those acts applied to persons with Russian nationality who fly privately, since these persons control the aeroplane as pilots. The DAC also stated that the term 'control' used in those acts should be interpreted broadly, which included the effective and material control of an aircraft and was not limited solely to economic and financial control.

Considering that she had been adversely affected by those acts, the applicant brought an action seeking, first, annulment of the contested regulation, in so far as it inserts Article 3d of Regulation No 833/2014, and annulment of the contested decision, in so far as it inserts Article 4e of Decision 2014/512, and, secondly, the recognition of her right to use her private pilot license to land in, take off from or overfly the territory of the European Union.

By its judgment, the General Court considers that the prohibition in question does not apply to the 'control' of an aeroplane, as its pilot, by a person with Russian nationality, as contended by the applicant. However, the result of that interpretation is that the applicant lacks standing to bring an

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140 Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 57, p. 4).

141 Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 57, p. 1).

142 This includes in particular Article 1(2) of Decision (CFSP) 2022/335, inserting Article 4e of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13), and Article 1(2) of Regulation (EU) 2022/334, inserting Article 3d of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1).

action against the contested regulation and, accordingly, the head of claim seeking annulment of that regulation must be dismissed as inadmissible. As for the other heads of claim submitted by the applicant, they are dismissed due to the lack of jurisdiction of the Court to hear them.

Findings of the Court

In the first place, the Court declares that it has no jurisdiction to hear the head of claim requesting it to recognise the applicant's right to use her private pilot licence and to land in, take off from or overfly the territory of the European Union, since, when exercising judicial review under Article 263 TFEU, the Court does not have the jurisdiction to deliver declaratory or confirmatory judgments.

In the second place, the Court declares that it has no jurisdiction to rule on the head of claim relating to the annulment of the contested decision, since, in accordance with the last sentence of the second subparagraph of Article 24(1) TEU read together with the second paragraph of Article 275 TFEU, and the case-law of the Court of Justice, [143] it is the individual nature of those acts adopted on the basis of provisions relating to the CFSP which permit access to the Courts of the European Union.

In this case, the prohibition measures provided by Article 4e of Decision 2014/512 concern any aircraft operated by Russian air carriers, any Russian-registered aircraft and any non-Russian-registered aircraft which is owned, chartered or otherwise controlled by a Russian natural or legal person, entity or body. Those measures thus apply to all aircraft that satisfy the objective criteria and do not constitute restrictive measures against natural or legal persons within the meaning of the second paragraph of Article 275 TFEU, but measures of general application. In those circumstances, the Court does not have jurisdiction to review their validity

In the third place, the Court declares the action inadmissible, in so far as it seeks the annulment of the contested regulation, because the applicant lacks standing to seek the annulment of that act.

In accordance with the fourth paragraph of Article 263 TFEU, to institute proceedings against a measure, a natural person must be directly concerned by those measures; that condition necessitates, inter alia, that the contested measure must directly affect the legal situation of that person.

In the present case, in order to determine whether the applicant is directly concerned by the restrictive measures at issue, the Court interpreted the concept of an aircraft being 'otherwise controlled' which determines, in part, the scope of Article 3d(1) of Regulation No 833/2014, following the method of interpretation laid down by the case-law. [144]

In that regard, although a literal interpretation of that concept may lead to the conclusion that it includes 'technical or operational' control, with the result that the prohibition could concern an aircraft operated by a natural person of Russian nationality, it should be considered, in the light of a contextual and teleological interpretation of that concept, that it applies only to economic or financial control.

On the one hand, the concept of an aircraft being 'otherwise controlled' arises in the economic and financial context in which the restrictive measures in question were adopted. First, the contested regulation amends Regulation No 833/2014, which provides for sectoral restrictive measures of an economic nature. Secondly, the expression 'otherwise controlled' follows on from the terms 'owned' and 'chartered', which are terms designating concepts that are relevant from an economic or financial view. Thirdly, the concept of 'control' is used in an economic or financial sense in other provisions of Regulation No 833/2014.

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143 Judgment of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, paragraph 103).

144 According to the case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 10 July 2014, D. and G., C-358/13 and C-181/14, EU:C:2014:2060, paragraph 32 and the case-law cited).

On the other hand, the objective pursued by the contested regulation is, inter alia, to exert maximum pressure on Russian authorities, in order for them to put an end to their actions against Ukraine. The restrictions on non-Russian-registered aircraft that are owned, chartered or otherwise economically or financially controlled affect the Russian aviation sector economically, thus contributing to the achievement of that objective.

Furthermore, observance of the principle of proportionality leads to the conclusion that a prohibition on landing, taking off from or overflying the territory of the European Union applicable to any aircraft controlled on a 'technical or operational' basis by a Russian citizen, in so far as it includes Russian citizens holding a private pilot's licence, would be manifestly inappropriate in the light of the objective of exerting pressure on the Russian authorities.

Therefore, the concept of a non-Russian-registered aircraft 'otherwise controlled' by a Russian natural or legal person is limited to any non-Russian-registered aircraft which is economically or financially controlled by such a person.

Since the applicant in the main action is not in that situation, she is not directly concerned by the prohibition provided in Article 3d of Regulation No 833/2014 as amended.

Judgment of the General Court (First Chamber, Extended Composition), 20 December 2023, Abramovich v Council, T-313/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Restriction on entry into the territory of the Member States – List of persons, entities and bodies subject to restrictions on entry into the territories of the Member States – Inclusion and maintenance of the applicant's name on the lists – Definition of 'leading businesspersons' – Article 2(1)(g) of Decision 2014/145/CFSP – Obligation to state reasons – Rights of the defence – Error of assessment – Proportionality – Equal treatment – Right to property – Freedom to conduct a business – Right to private life – Application of restriction on entry to a national of a Member State – Free movement of Union citizens

Following the military attack launched by the Russian Federation against Ukraine on 24 February 2022, the Council of the European Union adopted, on 25 February 2022, Decision 2022/429 [145] and Regulation 2022/427, [146] by way of which Roman Arkadyevich Abramovich was added to the lists of persons, entities and bodies adopted by the Council since 2014 [147] on account of the support given to actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

The applicant, who is a businessman of Russian, Israeli and Portuguese nationality, was made subject, by the Council, to a prohibition on entry into or transit through the European Union and had his funds and banking assets frozen, in accordance, respectively, with Article 1(1)(b) and (e) and Article 2(1)(d) and (g) of Decision 2014/145, as amended, on account of his close ties to President Putin and his

145 Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 87I, p. 44).

146 Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 87I, p. 1).

147 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16).

status as a major shareholder in Evraz, one of Russia's largest taxpayers. Those measures were extended in respect of the applicant in September 2022, [148] March 2023 [149] and April 2023 [150] for the same reasons.

The applicant brought an action before the General Court of the European Union seeking annulment of the acts of the Council and compensation of the harm allegedly suffered as a result of those acts.

The Court, which dismisses the action in its entirety, clarifies the scope of the listing criterion referred to in Article 2(1)(g) of Decision 2014/145 ('criterion (g)') based on the status of leading businessperson involved in economic sectors providing a substantial source of revenue to the Russian Government.

Findings of the Court

As regards, first of all, the obligation to state reasons, the Court recalls that the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him or her to understand the scope of the measure concerning him or her. It makes clear that the statement of reasons for an act of the Council which imposes a restrictive measure has not only to identify the legal basis for that measure but also the actual and specific reasons why the Council considers that such a measure must be adopted in respect of the person concerned. In the present case, the context and circumstances surrounding the adoption of the contested acts were well known to the applicant. Furthermore, the statement of reasons for the contested acts expressly refers to the listing criteria and the factual reasons why the Council decided to include or maintain his name on the lists at issue. Consequently, the Court holds that the contested acts set out, to the requisite legal standard, the matters of fact and law on which those acts are based.

In so far as concerns, next, the applicant's right to be heard, the Court observes that the mere fact that the Council did not find that the extension of the restrictive measures was unfounded, nor even deemed it necessary to carry out checks in the light of the observations submitted by the applicant, does not mean that it did not take cognisance of those observations. Although for the rights of the defence and the right to be heard to be observed, the EU institutions must enable the person concerned by the act adversely affecting him or her to make his or her views known effectively, those institutions cannot be required to accept those views. The Court finds that the Council discharged its obligations in so far as concerns the applicant's right to be heard.

Furthermore, as to the inclusion of the applicant's name on the lists on the basis of criterion (g), the Court observes that that criterion employs the concept of 'leading businesspersons' in correlation with the exercise of an activity 'in economic sectors providing a substantial source of revenue to the [Russian] Government', with no other condition regarding ties, be they direct or indirect, with that government. In that connection, there is a rational connection between the targeting of that category of persons and the objective of the restrictive measures in question, which is to increase the pressure on Russia and the costs of its actions against Ukraine. Accordingly, criterion (g) must be interpreted as meaning that it is intended to apply, on the one hand, to businesspersons regarded as 'leading' on account of their importance in their sector of activity and the importance of that sector to the Russian economy and, on the other hand, that it is the economic sectors in which those persons operate which must provide a substantial source of revenue to the Russian Government.

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148 Council Decision (CFSP) 2022/1530 of 14 September 2022 amending Decision 2014/145 (OJ 2022 L 239, p. 149) and Council Implementing Regulation (EU) 2022/1529 of 14 September 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 1).

149 Council Decision (CFSP) 2023/572 of 13 March 2023 amending Decision 2014/145 (OJ 2023 L 75I, p. 134) and Council Implementing Regulation (EU) 2023/571 of 13 March 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 75I, p. 1).

150 Council Decision (CFSP) 2023/811 of 13 April 2023 amending Decision 2014/145 (OJ 2023 L 101, p. 67) and Council Implementing Regulation (EU) 2023/806 of 13 April 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2023 L 101, p. 1).

In the present case, the Court holds that the Council rightly considered that the applicant was a leading businessperson an account, in particular, of his professional status, the importance of his economic activities, the scale of his capital holdings in Evraz and, more particularly, his status as principal shareholder in the parent company of that group of companies.

The Court also points out that the Council adduced a sufficiently specific, precise and consistent body of evidence capable of demonstrating that the economic sector in which the applicant pursues an activity provides a substantial source of revenue to the Russian Government. In that connection, the Court points out that, contrary to the applicant's claim, the phrase 'providing a substantial source of revenue to the [Russian] Government' set out in criterion (g) refers to the revenue from important economic sectors in Russia and not solely to the taxes paid by leading businesspersons. Furthermore, the circumstance that the tax revenue from the steel and mining sector is primarily allocated to the budgets of local federal entities is irrelevant. Even though that source of revenue is not intended for the federal budget or used directly by that government in order to support its military expenditure, the fact remains that that source allows that government, as a whole, without distinction as to whether that revenue comes from the federal budget or the regional budgets, to mobilise even more resources for its actions to compromise the territorial integrity, sovereignty and independence of Ukraine.

Accordingly, the Council did not make an error of assessment by deciding to include then maintain the applicant's name on the lists at issue.

As regards the applicant's argument that the Council's application of criterion (g) is discriminatory, in that that criterion targets Russian businesspersons and undertakings whilst ignoring foreign undertakings, the Court states that that criterion does not refer to the nationality of the persons designated, but any natural person with the status of leading businessperson within the meaning of that criterion. Consequently, the persons subject to the restrictive measures at issue may be of any nationality if they meet the criterion in question.

As regards the alleged infringement of the principle of proportionality, the Court considered, in the light of the fundamental importance of the objectives pursued by the restrictive measures at issue, which are part of the wider objective of preserving peace, that the negative consequences resulting from the application thereof to the applicant are not manifestly disproportionate. The Council's approach of gradually widening the circle of persons and entities subject to the restrictive measures at issue, on account of the worsening of the situation in Ukraine, in order to achieve the objectives pursued, supports that finding. Furthermore, those measures are appropriate in the light of the necessary objectives of general interest pursued, in so far as alternative, less restrictive measures would not be as effective in achieving the objectives pursued. The principle of proportionality has, therefore, not been infringed.

Finally, as regards the infringements of fundamental rights on which the applicant relies, the Court notes that, in accordance with the provisions of Article 52(1) of the Charter of Fundamental Rights of the European Union, these are not absolute rights and may be subject to limitations, provided that the limitations concerned are provided for by law, respect the essence of the fundamental right at issue and, subject to the principle of proportionality, are necessary and meet objectives of general interest recognised by the European Union. The Court finds that those conditions are satisfied in the present case. Moreover, it observes that restrictive measures are not, by their nature, criminal in any way and the effect thereof is therefore not to infringe the right to the presumption of innocence, recognised in Article 48(1) of the Charter of Fundamental Rights of the European Union. Consequently, the limitations on the applicant's fundamental rights, which follow from the restrictive measures taken against him in the contested acts, are not disproportionate and do not vitiate those acts due to any unlawfulness.

Since the condition relating to the unlawfulness of the Council's alleged conduct has not been satisfied, the Court ultimately finds that the non-contractual liability of the European Union cannot be incurred and, consequently, dismisses the applicant's claim for compensation.

Nota bene:

The résumés of the following cases are currently being finalised and will be published in a future issue of the Monthly Case-Law Digest :

- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Krajowa Rada Sądownictwa (Continued holding of a judicial office), C-718/21, EU:C:2023:1015
- Judgment of the Court of Justice (Grand Chamber), 21 December 2023, Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias, C-66/22, EU:C:2023:1016
- Judgment of the Court of Justice (Fourth Chamber), 25 January 2024, Audi (Emblem support on a radiator grille), C-334/22, EU:C:2024:76
- Judgment of the Court of Justice (Grand Chamber), 30 January 2024, Landeshauptmann von Wien (Family reunification with a minor refugee), C-560/20, EU:C:2024:96
- Judgment of the Court of Justice (Grand Chamber), 30 January 2024, Direktor na Glavna direktsia „Natsionalna politsia“ pri MVR – Sofia, C-118/22, EU:C:2024:97
- Judgment of the General Court, 20 December 2023, Autorità di sistema portuale del Mar Ligure occidentale and Others v Commission, T-166/21, EU:T:2023:862
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Ryanair and Malta Air v Commission (Air France; COVID-19), T-216/21, EU:T:2023:822
- Judgment of the General Court (Eighth Chamber, Extended Composition), 20 December 2023, Ryanair and Malta Air v Commission (Air France-KLM and Air France; COVID-19), T-494/21, EU:T:2023:831
- Judgment of the General Court (Eighth Chamber, Extended Composition), 24 January 2024, Dexia Crédit Local v SRB, T-405/21, EU:T:2024:33
- Judgment of the General Court (Eighth Chamber, Extended Composition), 24 January 2024, Germany v Commission, T-409/21, EU:T:2024:34
- Judgment of the General Court (Fourth Chamber), 24 January 2024, Veritas v Commission, T-602/22, EU:T:2024:26
- Order of the General Court, 25 January 2024, Lukoil v Parliament and Others, T-280/23, EU:T:2024:41
- Judgment of the General Court (First Chamber, Extended Composition), 31 January 2024, Symphony Environmental Technologies and Symphony Environmental v Parliament and Others, T-745/20, EU:T:2024:45